Community Hospitals of Central California d/b/a University Medical Center *and* California Nurses Association and Service Employees International Union, Local 752, Service Employees International Union, AFL–CIO. Cases 32–CA–15864 and 32–CA–15976

September 26, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 18, 1998, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed a brief in support of certain portions of the judge's decision, limited exceptions, and a supporting brief. The Charging Party, California Nurses Association, filed an answering brief in support of the judge's decision and a reply to the Respondent's answering brief. The Respondent filed exceptions and a supporting brief, a brief responding to the General Counsel's limited exceptions, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

1. Unlawful refusal to recognize the Union

For the reasons stated fully by the judge, we adopt the judge's finding that as of October 7, 1996, the Respondent has been a successor employer to Valley Medical Center (VMC or the predecessor) under the test of *Fall River Dyeing Corp. v. NLRB*[3] and *NLRB v. Burns Security Services*.[4] We also agree with the judge that a unit consisting of employees previously employed by VMC in unit 7 job classifications remained intact under the Respondent and continues to be an appropriate, single-facility unit.[5]

The California Nurses Association (the Union), the collective-bargaining representative of the predecessor's unit seven employees, made its initial demand for recognition and bargaining on August 16, 1996, before the Respondent's takeover of VMC was finalized. This was a continuing demand. Accordingly, we adopt the judge's finding that the Respondent's obligation to bargain with the Union was established as of October 7, at which time the Respondent had assumed control of the predecessor and a majority of the unit consisted of the predecessor's employees.[6] The judge found that "at no time did Respondent ever respond substantively to the Union's demand for recognition." Further, the judge rejected, for lack of evidence, the Respondent's defense that it refused to recognize and bargain with the Union because it had a good-faith doubt that the Union retained the support of a majority of the unit employees. Thus, the judge found that the Respondent violated Section 8(a)(5) and (1) of

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. In particular, we find no evidence to support the Respondent's claim that the judge engaged in "open displays of hostility" toward the Respondent and its counsel during the hearing. Further, we find, for the reasons fully explained by the judge, that he did not violate the Respondent's due process rights by imposing time limits for the completion of the Respondent's case in chief. In any case, the Respondent has not claimed that it suffered any particularized harm because of these time limits and does not seek a specific remedy beyond asking the Board "to take into consideration these [due process] issues when reviewing [the] decision."

Contrary to our colleague, we adopt the finding that the Respondent violated Sec. 8(a)(1) of the Act by maintaining certain unlawful provisions in its employee handbook, standards of conduct. We correct, however, the judge's inadvertent erroneous reference in his conclusion of law, par. 10, to the relevant portions of the handbook. Accordingly, we adopt the judge's finding that the Respondent unlawfully maintained pars. 1 (insubordination, etc.) and 8 (not 3, as incorrectly referenced by the judge) (release or disclosure of confidential information). There were no exceptions to the judge's recommended dismissal of the allegation concerning par. 2 (unauthorized removal, damage, use, or possession of the Respondent's records).

[2] We correct the judge's inadvertent omission from the Order and notice to employees of the appropriate provisions corresponding to his finding, which we have adopted, that the Respondent violated Sec. 8(a)(1) of the Act by maintaining unlawful provisions in its employee handbook.

We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[3] 482 U.S. 27, 41–43 (1987).

[4] 406 U.S. 272 (1972).

[5] As noted infra, those job classifications include anesthetist I, II, and noncertified clinical nurse specialist, mental health nurse I and II, nurse interim permittee and (permittee A), nurse practitioner, public health nurse I and II, staff education and development instructor (step 4), staff nurse I, I–A, II, II–A, III, and III–A. The judge found that as of October 15, 1996, 1 week after the Respondent assumed control of predecessor employer VMC, the Respondent employed 278 of the predecessor's unit 7 employees in its unit 7, which consisted of 307 employees.

There were no exceptions to the judge's recommended dismissal of all complaint allegations relating to historical units 5 and 12 and the bargaining representative of those unit employees, Service Employees International Union, Local 752.

[6] *Fall River Dyeing Corp. v. NLRB*, supra, fn. 106 at 52–53.

the Act by refusing to recognize and bargain with the Union.[7]

We agree that the Respondent violated the Act by failing to recognize and bargain with the Union. However, we do so pursuant to the successor bar rule established by the Board in *St. Elizabeth Manor*, supra,[8] where the Board held:

> [O]nce a successor's obligation to recognize an incumbent union has attached (where the successor has not adopted the predecessor's contract), the union is entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, an employer petition, or a rival petition.[8]

[8] In the successorship situation, the successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. [Citation omitted.] Thus, because the employer's obligation to recognize the union commences at that time, as soon as those two events have occurred, the bar to the processing of a petition or to any other challenge to the union's majority status begins, whether or not the employer has actually extended recognition to the union as of that time.

Here, as set forth above, all of the factors necessary to establish a successor bar are present. The Union made a demand for recognition and bargaining on August 16, 1996. That demand continued in effect through October 7, 1996, when the Respondent assumed control of predecessor VMC and had hired a substantial and representative complement (278 of 307) of the employees formerly employed by VMC in unit 7. Thus, beginning on October 7, the Respondent's duty to recognize and bargain with the Union as the representative of the unit employees attached; and the Union was entitled to a reasonable period[9] of bargaining without challenge to its representative status. In failing to honor its obligation, the Respondent has violated Section 8(a)(5) and (1) of the Act.

Alternatively, we agree with the judge, for the reasons he sets forth in section III,B,2,e of his attached decision, applying *Allentown Mack*, supra, that the Respondent did not establish that it *had* a good faith, reasonable doubt about the Union's continued majority status and that, indeed, the Respondent never *relied* on any alleged good-faith doubt as a reason not to recognize the Union. Thus, even if the Respondent's refusal to recognize the Union had not been unlawful under *St. Elizabeth Manor*, it would have been unlawful under *Allentown Mack*.

Accordingly, we shall adopt the judge's recommended Order and require the Respondent to recognize and bargain in good faith with the Union on behalf of the unit employees.[10] We have determined that an affirmative bargaining order is warranted and is necessary to fully remedy the allegations in this case.[11] Such an order vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful refusal to recognize and bargain

[7] After the judge issued his attached decision, the Board issued decisions in *St. Elizabeth Manor*, 329 NLRB 341 (1999), and *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).

St. Elizabeth Manor reestablished the principle that a successor employer violates Sec. 8(a)(5) if it withdraws recognition from an incumbent union before a reasonable period of time for bargaining has elapsed, whether that withdrawal is based on a good-faith doubt of the union's continuing majority status or evidence of actual loss of majority status. *Inn Credible Caterers*, 333 NLRB 898 fn. 5 (2001).

Subsequently, *Levitz* overruled *Celanese Corp.*, 95 NLRB 664 (1951), and held (1) that employers are no longer permitted unilaterally to withdraw recognition from an incumbent union on the basis of a good-faith doubt about the union's continuing majority status, and (2) an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. However, the holding in *Levitz* is not being applied *retroactively* to cases, like this one, involving asserted "good-faith doubt" of a union's continued majority status. Rather, the applicable standard for cases that were pending at the time the Board issued *Levitz* is the "good faith uncertainty" standard as explicated by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). *Levitz*, supra, at 727 (*Prospective Application*).

[8] See *Inn Credible Caterers, Ltd.*, supra.

[9] In determining whether a reasonable period has elapsed prior to the filing of a petition, the Board looks to the length of time as well as what has been accomplished in the bargaining. *St. Elizabeth Manor*, supra, citing *Ford Center for the Performing Arts*, 328 NLRB 1 (1999).

[10] *Inn Credible Caterers*, supra.

[11] We agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), and *Williams Enterprises*, 312 NLRB 937 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful refusal to recognize and bargain with the Union. We adhere to the view, reaffirmed by the Board in *Caterair*, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." 322 NLRB at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g. *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires, and we find that a balancing of the three factors warrants an affirmative bargaining order. Chairman Hurtgen does not disagree with the court's view.

with the Union. Moreover, a bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. As noted, the Respondent never recognized the Union and never suggested it would bargain with the Union.[12] This fact weighs more heavily in favor of the Section 7 rights of former VMC employees, whose rights were infringed upon by the Respondent's refusal to recognize the Union.

Further, a bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charge and issuance of a cease-and-desist order.

In addition, a cease-and-desist order, without a temporary bar against challenging the Union's representative status, would be inadequate to remedy the Respondent's violations because it would not afford the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charge has been protracted, and the Respondent's unfair labor practices are of a continuing nature and are likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary adverse impact the affirmative bargaining order will have on the rights of employees who oppose continued representation.

Finally, the successor bar rule adopted in *St. Elizabeth Manor* effectively provides the same reasonable period for bargaining here as would an affirmative bargaining order.

[12] Based on all the evidence of the planning process leading up to the Respondent's takeover of predecessor VMC, including the Respondent's failure to allow participation by the Union, the judge found that the "Respondent never had any intention of recognizing CNA and the purported efforts by the transition team and others, including legal counsel, were mere window-dressing for a decision that had never been in doubt."

2. Unlawful handbook provisions

In section III,B,3 of his attached decision, the judge found that the Respondent violated Section 8(a)(1) by maintaining rules in its employee handbook prohibiting:

> [Rule] 1. Insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual;
>
> . . . .
>
> [Rule] 8. Release or disclosure of confidential information concerning patients or employees.

The Board's standard for analyzing workplace rules like these is set out in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999), as follows:

> In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. [Footnote omitted.]

Our dissenting colleague would reverse the judge's 8(a)(1) findings, arguing that *Lafayette Park* supports his position. He finds that the mere maintenance of rules 1 and 2 would not reasonably tend to chill employees in the exercise of their Section 7 rights. He asserts that neither rule *expressly* prohibits protected activity and that no employee has been shown to have *actually* been prevented, discouraged, or restrained by these rules from exercising their rights under the Act. Although he acknowledges that rule 1 prohibits "disrespectful conduct towards . . . an individual," he finds that employees would not reasonably conclude that the rule applies to employee solicitation of union support from other employees. Rather, he finds that, in context, rule 1 is aimed at conduct in the course of *business* dealings, and that there is nothing in the rule, as written, to suggest that it involves employee-to-employee communications about *union* matters.

We disagree with our colleague's application of *Lafayette Park* and his narrow assessment of the potentially chilling scope of this rule, which seemingly springs from the absence of expressly and clearly unlawful terminology in the rule itself. Rather, we fully agree with the judge's analysis of the unlawfulness of this rule. Although the judge does not cite *Lafayette Park* (the Board's decision in that case issued just a few weeks before the judge issued his decision here), we find that his analysis is entirely consistent with the *Lafayette Park*

standard set forth above. As the judge reasoned, concerted employee protest of supervisory activity and employee solicitation of union support from other employees are protected activities under the Act, and employees here could reasonably believe that both forms of activity might be prohibited by rule 1's prohibition against "[i]nsubordination . . . or other disrespectful conduct" towards service integrators and coordinators and other individuals.[13]

Contrary to our colleague, our decision is not in conflict with the Board majority's ruling in *Lafayette Park* regarding standard of conduct 6, which prohibited employees from:

> Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

In *Lafayette Park*, the majority, focusing on the "goals and objectives" language, concluded that the language in question addressed legitimate business concerns and contained no ambiguity. The rule in this case, however, included no such limiting language which removes its ambiguity and limits its broad scope.

Nor is our decision here in conflict with the District of Columbia Circuit's recent opinion in *Adtranz ABB Daimler-Benz Transportation N.A., Inc. v. NLRB*, 253 F.3d 19 (2001), vacating in pertinent part 331 NLRB 291 (2000). There, the employer published and distributed to its employees in a handbook a rule prohibiting, as serious misconduct, the use of "abusive or threatening language to anyone on company premises." The Board focused on the aspect of the rule prohibiting *abusive* language, ibid., 291 fn. 3. The Board majority (with Member Brame dissenting in pertinent part) adopted the administrative law judge's finding, relying on *Flamingo-Hilton Laughlin*, 330 NLRB 287 (1999), that the prohibition against abusive language was per se unlawful because it did not make it clear that it was not intended to prohibit lawful union organizing propaganda, and could thus, absent such an explanation, reasonably be interpreted by employees as prohibiting such communication.

The court vacated this unfair labor practice finding. At the outset, the court said that it would enforce Board rulings where the Board faithfully applies the standard in *Lafayette Park Hotel*, supra (i.e., whether the rule in question would reasonably tend to chill employees in the exercise of their statutory rights) and adequately explains the basis for its conclusion. 253 F.3d at 25. The court found, however, that the Board had failed to explain the basis for its conclusion that the rule prohibiting abusive or threatening language in the workplace could reasonably be interpreted on its face as prohibiting lawful union propaganda. Indeed, the court rejected any notion that employees are incapable of organizing a union or exercising their other statutory rights under the Act without resort to abusive or threatening language. Id. at 26. Moreover, the court found that *abusive* language in the workplace can constitute verbal harassment, triggering employer civil liability under both federal and state law for failure to maintain a workplace that is free of harassment. Id. at 27. Further, the court found that *threatening* language in the workplace carries with it the potential for violent confrontations, again triggering employer liability. Id.

In this case, however, the rule in question prohibiting all *disrespectful* conduct towards others, is clearly broader on its face than the rule in *Adtranz*, which prohibited only abusive or threatening language.[14] Words and conduct may be regarded as disrespectful—that is, lacking in deference or special regard or discourteous[15]—without being perceived as actually abusive or threatening. In other words, there are degrees of unwanted overtures. And defining due respect, in the context of union activity, seems inherently subjective. An employee exposed to vigorous proselytizing for or against a union, which he preferred to avoid or which reflected an opposing view, might well feel that he was being treated with a lack of respect, even if he did not feel threatened or abused. He might believe, then, that such conduct violated the Respondent's rule and could be reported.[16]

[13] The judge relied on, inter alia, *Southern Maryland Hospital*, 293 NLRB 1209, 1221–1222 (1989), enfd. in pertinent part 916 F.2d 932 (4th Cir. 1990) (Unlawful rule against, inter alia, "derogatory attacks on fellow employees . . . or hospital representative[s]"). In enforcing the pertinent part of the Board's Order, the Fourth Circuit said:

> Although certain types of derogatory remarks may sound quite similar to maliciously false and defamatory speech, which an employer may prohibit, derogatory remarks may also include truthful union propaganda that places hospital personnel in an unfavorable light. By permitting the punishment of employees for speaking badly about hospital personnel, the employer "fail[ed] to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities." *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979). It may very well be true that derogatory attacks destroy, as the hospital puts it, "the positive work atmosphere," but the values of free speech and union expression outweigh employer tranquility in this instance. [916 F.2d at 940.]

[14] "Disrespectful" means lacking in high or special regard, or lacking in deference. *Webster's New Collegiate Dictionary* (1977).

[15] See, e.g., *Webster's New Collegiate Dictionary* (1977); *American Heritage Dictionary of the English Language* (2000). A pushy salesman, for example, might well be viewed as being disrespectful without crossing the line into harassment.

[16] See, e.g., *Vestal Nursing Center*, 328 NLRB 87 (1999) (letter to employees advising them that they should inform the employer of the names of any employees who harass them regarding their opinions

Correspondingly, potential employee advocates could reasonably anticipate that some members of their targeted audience would believe that the rule shielded them from contact with any expression of views that they did not welcome or agree with. In short, the rule here is significantly more likely to chill employees in the exercise of their Section 7 rights than the rule at issue in *Adtranz*. In contrast to the dissent, we do not believe that employees' reasonable understanding of the rule will be governed by "applying the rule of ejusdem generis." Such rules of construction guide attorneys in drafting legal documents, but not lay employees in attempting to understand employment rules of conduct. Accordingly, we find it unlawful on its face, under Section 8(a)(1) of the Act.

As for rule 8 (prohibiting "release or disclosure of confidential information concerning patients or employees"), our colleague asserts here also that the rule does not expressly prohibit Section 7 activity, and that it is justified by the Respondent's right to keep its business records confidential and to protect its confidential personnel records against misuse. We find, however, in agreement with the judge and contrary to our colleague, that rule 8 is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of "confidential information" about employees. *Flamingo Hilton-Laughlin*, 330 NLRB at 288 (unlawful rule prohibiting employees from revealing "confidential information regarding our customers, fellow employees, or Hotel business"); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–466 (1987) (unlawful rule characterizing "Hospital affairs, patient information, and employee problems" as "absolutely confidential," and prohibiting employees from discussing them).

ORDER

The National Labor Relations Board orders that the Respondent, Community Hospitals of Central California d/b/a University Medical Center, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with California Nurses Association respecting the unit set forth below.

(b) Maintaining unlawful provisions in the employee handbook, Standards of Conduct.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with California Nurses Association as the exclusive bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody said understanding in a signed agreement:

> Employees of University Medical Center formerly employed at VMC in the following job classifications:
>
> Anesthetist I, II, and Non-certified Clinical Nurse Specialists, Mental Health Nurse I and II, Nurse Interim Permittee and (Permittee A), Nurse Practitioner, Public Health Nurse I and II, Staff Education and Development Instructor (Step 4), Staff Nurse I, I–A, II, II–A, III, and III–A.

(b) On request of the California Nurses Association, restore the status quo ante of former unit 7 employees, rescinding any changes made in the former unit 7 employees' wages, hours, and working conditions that were implemented on and after October 7, 1996, and make all affected former unit 7 employees whole for any and all losses they incurred by virtue of the changes to their wages, fringe benefits, and other terms and conditions of employment from October 7, 1996, until it negotiates in good faith with the California Nurses Association to agreement or to impasse, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Rescind unlawful provisions previously maintained in the employee handbook, Standards of Conduct.

(e) Post at its Fresno, California facilities (UMC, FMC, and CCH), copies of the attached notice marked

about the union could easily cover legitimate union activity, as it leaves it to the employee to determine any perceived interruption or harassment; letter encourages employees to report any perceived harassment and clearly has a chilling effect on legitimate union activity, in violation of Sec. 8(a)(1) of Act); letter has potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities. (Citing *Mississippi Transport*, 310 NLRB 1339, 1344 (1993)).

"Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply.

CHAIRMAN HURTGEN, concurring in part and dissenting in part.

1. I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the California Nurses Association (the Union) and that an affirmative bargaining order is warranted. Contrary to my colleagues, I do not reach that decision by application of the "successor bar" rule established in *St. Elizabeth Manor*,[1] a case in which I dissented. Rather, for the reasons explained in that dissent, I adhere to the previously well-settled and well-reasoned precedent. However, under that precedent, and in agreement with the judge, I find that the Respondent was not justified in refusing to recognize the Union. It did not have a reasonable doubt, based on objective factors, that the Union continued to command the support of a majority of the unit employees.

The judge correctly found that: (a) the Respondent is a *Burns*[2] successor employer; (b) the historic unit (employees previously employed by the predecessor in unit 7 job classifications) remained intact at the Respondent; (c) the historic unit continued to be an appropriate, single-facility unit; and (d) the California Nurses Association (the Union) made a valid demand for recognition and bargaining effective August 17, 1996, and continuing thereafter.[3] Thus, in agreement with the judge and my colleagues, I find that the Respondent's obligation to recognize and bargain with the Union was established as of October 7, when the Respondent assumed control of the predecessor and hired a majority of the predecessor's employees.

The Respondent never responded substantively to the Union's demands. As noted above, the Union made its initial demand for recognition and bargaining on August 16, almost 2 months before the Respondent took control of the predecessor and at a time when transition from predecessor to the Respondent was beginning, but before the Respondent had finally assumed control. The Respondent acknowledged the demand, saying that it had been forwarded to legal counsel for "appropriate action." The Union's request for recognition operated as a continuing demand.[4] Further, when there was no response from the Respondent following the final takeover of the predecessor on October 7, the Union made subsequent demands on October 29 and November 25, to no avail.

As more fully explained in the judge's decision, none of the Respondent's careful and extensive pretransition studies, models, and reports anticipated any role for the Union at the Respondent. Credited testimony by Henry Perea, former human resource director at the predecessor, establishes that, during a pretakeover meeting between Perea and the Respondent's human resources official and legal counsel, the Respondent representatives made it clear that the Respondent was not interested in having unions "as part of their overall system in the context of merger discussions." Thus, the judge concluded, from the Respondent's pretransaction and transition period course of conduct, that the Respondent "never had any intention of recognizing [the Union] and the purported efforts by transition team and others including legal counsel, were mere window-dressing for a decision [not to recognize and bargain with the Union] that had never been in doubt." This pretransaction conduct, standing alone, casts doubt on the Respondent's assertion that it refused to recognize the Union because it had a good-faith doubt of the Union's continued majority status.

The Respondent's pretransaction conduct does not stand alone, however. In response to the unfair labor practice charges filed in this case beginning in April 1997 by the Union, the Respondent submitted two statements of position to the Regional Director. In neither position statement did the Respondent raise good-faith doubt of the Union's majority status as a basis for refusing to recognize the Union.

Further, at the hearing the Respondent's witnesses cited a number of incidents that purportedly caused it to believe that a majority of the unit employees did not support union representation. As more fully related by the

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 329 NLRB 341 (1999). See also, my dissent in *Inn Credible Caterers*, 333 NLRB 898 (2001).

[2] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[3] All dates are 1996.

[4] See, e.g., *Aircraft Magnesium,* 265 NLRB 1344, 1345 (1982), citing *Williams Energy Co.*, 218 NLRB 1080 fn. 4 (1975).

judge, some witnesses testified that unit employees had expressed frustration with several aspects of the negotiations between the Union and Fresno County in protracted collective-bargaining negotiations before and during the early stages of the Respondent's consideration of a possible takeover of the predecessor. The judge found, and I agree, that these matters were too distant in time from October 7 to support a claim of good-faith doubt.[5] Respondent witnesses also testified to reports of employee disagreement with the Union's position against the takeover and dissatisfaction with the personal conduct of Union Representative Karen Short. The judge found, and I agree, that those concerns were resolved by Short's resignation from her union offices early in 1996.

The judge noted, in any case, that the objections voiced by the Respondent's witnesses were not to the Union per se, but merely to a particular policy, goal, or tactic.[6] Further, the judge noted that "all or most" of the Respondent's unit witnesses continued their union membership through October 6, the day before the takeover became final, and even on the witness stand at the instant hearing "professed a strong belief in having a labor union represent them in collective bargaining." Thus, I agree with the judge that none of the above-described evidence of purported employee disaffection from the Union provides an objective basis for the Respondent's claim of good-faith doubt.

Particularly in light of the Respondent's failure to adduce evidence showing who at Respondent made the decision not to recognize and bargain with the Union or why the decision was made,[7] the judge found that the Respondent failed to show a nexus between the evidence allegedly supporting a good-faith doubt and the Respondent's decision not to recognize the Union.

For all of the above reasons, I adopt the judge's finding that the Respondent was not justified in refusing to recognize the Union because it did not have a reasonable, good-faith doubt, based on objective factors, that the Union continued to command the support of a majority of the unit employees.[8]

2. My colleagues adopt the judge's finding that the Respondent violated Section 8(a)(1) by maintaining certain provisions in its employee handbook. Their finding is inconsistent with the Board majority's application of the relevant law in *Lafayette Park Hotel*.[9] Thus, I do not join them in adopting the judge's decision on this issue.[10]

In *Lafayette Park Hotel*, the Board considered whether the employer's mere maintenance of certain rules in its employee handbook violated the Act. The Board agreed on the standard to be applied—that is, whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect, the Board may conclude that their mere maintenance is an unfair labor practice. However, the Board was split on the application of the standard to rules substantially similar to those at issue here.[11] Thus, in a split decision, in which I was in the majority, the Board found lawful, inter alia, the employer's rules against:

> [b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support [the employer's]goals and objectives
>
> and
>
> [d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

As to the former rule, the Board majority found that the rule was unambiguous as written, and that any arguable ambiguity arose only through parsing and viewing in isolation the language of the rule and attributing to the employer an interference with employee rights. The majority declined to place such a strained construction on the language and, thus, concluded that employees would not reasonably conclude that the rule as written prohibited Section 7 activity. Moreover, the majority observed that the employer had not enforced the rule or by any

[5] Henry Perea credibly testified, contrary to the Respondent's contention, that union membership "held steady" during the collective-bargaining negotiations.

[6] An employee may desire continued representation by a union even while engaging in a wide range of action that disclose conflict with, or opposition to, the union's goals or tactics. See, e.g., *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1288–1289 (6th Cir. 1989).

[7] My colleagues have adopted the judge's finding that the Respondent violated the Act by refusing to recognize and bargain with the Union, which was supported, in part, by an adverse inference based on the Respondent's failure to comply with a subpoena duces tecum for documents tending to relate to Respondent's alleged good-faith doubt of the Union's majority status. I join them in finding this inference reasonable. I would find the violation even without this adverse inference, however, because as I have explained, I find that the Respondent had no legally cognizable uncertainty of the Union's continued majority support among unit employees.

[8] In reaching this conclusion, I do not rely on the judge's analysis under *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), in fn. 21 of the judge's decision.

[9] 326 NLRB 824 (1998).

My colleagues say that I am applying my personal view, as set forth in *Lafayette Park*. This is not the case. I am not contending here that Respondent's rule is justified by a significant employer interest (although I think that it is). I am contending only that the rule does not reasonably tend to chill employees in the exercise of Sec. 7 rights.

[10] I join my colleagues in rejecting the Respondent's motion to dismiss the complaint allegations regarding certain provisions of the handbook.

[11] Id. at 825–826.

other conduct led employees reasonably to believe that the rule prohibited Section 7 activity. Similarly, the Board majority found that the employer's maintenance of the latter rule was not unlawful. Specifically, the majority found that: (a) the rule was not ambiguous on its face; and (b) employees would reasonably understand that the rule was designed to protect the employer's interest in maintaining confidentiality of its business information, rather than to prohibit discussion of their wages. Accordingly the majority concluded that the rule did not implicate employee Section 7 rights.

Consistent with the majority view in *Lafayette Park Hotel*, I would find that the Respondent did not violate Section 8(a)(1) of the Act by maintaining in its employee handbook, Standards of Conduct, rules 1 and 8.[12] These rules provide as follows:

> While it is not intended to be an exhaustive list, below are examples of misconduct that are not permitted and may lead to disciplinary action, including discharge:
>
> 1. Insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual;
>
> . . . .
>
> 8. Release or disclosure of confidential information concerning patients or employees.

As noted, in determining whether the mere maintenance of rules, such as the Respondent's, violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Applying this test, I find that the mere maintenance of these rules by the Respondent would not reasonably tend to chill employees in the exercise of the Section 7 rights. Neither rule expressly prohibits protected activity, nor could either rule reasonably be interpreted to do so. Further, there is no evidence that any employee has actually been prevented, discouraged, or restrained by these rules in any manner from exercising rights protected by Section 7.

Rule 1, in providing that it is unacceptable to employees to engage in insubordination or related conduct, is unambiguous on its face. It does not prohibit Section 7 activity. It addresses the Respondent's business concern to maintain discipline and orderly, productive, and respectful relations between employees, managers, and supervisors. Concededly, the rule bars disrespectful conduct in relation to "other individuals." My colleagues say that "disrespectful" means "discourteous," and that an employee solicitation can reasonably be viewed by the solicitee as discourteous. In my view, words in a rule are to be interpreted in the context of the rule, not simply by reference to a dictionary. Applying that principle, the rule, in context, is aimed at conduct in the course of business dealings. Indeed, the meaning of the term "or other disrespectful conduct" is limited by the remainder of the rule's language to certain types of conduct. Thus, the "disrespectful conduct" addressed by the rule is specifically directed at "insubordination, refusing to follow directions, obey legitimate requests or orders." Applying the rule of ejusdem generis, the term "disrespectful" means conduct of a nature that is similar to the types of conduct previously set forth. There is nothing in the rule to suggest that it involves employee-employee communication of a private or union nature. I am unwilling to place a strained construction on the language.

Because the rule does not explicitly or implicitly prohibit Section 7 activity, employees could not reasonably fear that their protected right to communicate their views regarding the union or their wages and conditions of employment would expose them to potential discipline pursuant to the rule. I find that employees would not reasonably conclude that the rule, as written, prohibits Section 7 activity. Accordingly, I find that rule 1 would not reasonably tend to chill employees in the exercise of their Section 7 rights.[13]

Similarly, rule 8, prohibiting unauthorized release or disclosure of confidential information about patients or employees, does not expressly prohibit Section 7 activity and is justified by the Respondent's right to keep its business records confidential. Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information, and in protecting confidential personnel records against misuse by unauthorized persons. In fact, application of the rule is expressly limited to "confidential information," a phrase

[12] As noted by my colleagues, there were no exceptions to the judge's recommended dismissal of allegations regarding rule 2, which I join in adopting.

[13] Thus, this case is unlike the broader and less clearly limited rule at issue in *Southern Maryland Hospital*, 293 NLRB 1209, 1221–1222 (1989), enfd. in pertinent part 916 F.2d 932 (4th Cir. 1990). There, the rule at issue prohibited "malicious gossip or derogatory attacks on fellow employees . . . or hospital representative[s]," subject to discipline for violation. The Board, with judicial approval, found that the broad rule reasonably could have been understood to encompass "truthful union propaganda that places hospital personnel in an unfavorable light." Further, my decision here is supported by the District of Columbia Circuit's recent opinion in *Adtranz ABB Daimler-Benz Transportation N.S., Inc. v. NLRB*, 253 F.3d 19 (200l). There, the court vacated, in pertinent part, 331 NLRB 291 (2000), the Board's finding unlawful a rule prohibiting "abusive or threatening language to anyone on company premises."

that, in context, employees would reasonably understand to encompass proprietary or private information of the Respondent. I do not believe that employees would reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union, or potentially exposing employees to discipline for doing so. I would not speculate, as do my colleagues, that rule 8 prohibits activity protected by Section 7. Thus, I find that rule 8 would not reasonably tend to chill employees in the exercise of their Section 7 rights.

Because rules 1 and 8 are specifically focused on legitimate employer interests, and neither rule prohibits Section 7 activity or reasonably could be construed to do so, employees could not reasonably fear that their Section 7 protected activities are encompassed within the conduct prohibited by the rules and made punishable by disciplinary action. Thus, as I have found, neither rule would reasonably tend to chill employees' exercise of their Section 7 rights. To find otherwise would require that I unreasonably parse the language of the rules and speculate regarding the Respondent's intent to interfere with employees' Section 7 rights. I decline to do so.

Accordingly, I would dismiss the allegations regarding Standards of Conduct 1 and 8.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the California Nurses Association as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> Employees of University Medical Center formerly employed at VMC in unit 7 in the following job classifications: Anesthetist I, II, and Non-certified Clinical Nurse Specialist, Mental Health Nurse I and II, Nurse Interim Permittee and (Permittee A), Nurse Practitioner, Public Health Nurse I and II, Staff Education and Development Instructor (Step 4), Staff Nurse I, I–A, II, II–A, III, and III–A.

WE WILL NOT maintain unlawful provisions in our employee handbook, Standards of Conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the California Nurses Association as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth above concerning wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request of the California Nurses Association, restore the status quo ante of former unit 7 employees, rescinding any changes made in the unit employees' wages, hours, and working conditions that were implemented on or after October 7, 1996, and make all affected unit employees whole, with interest, for any losses they incurred by virtue of the changes in their wages, benefits, and other terms and conditions of employment from October 7, 1996, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL rescind unlawful provisions from the employee handbook, Standards of Conduct.

> COMMUNITY HOSPITALS OF CENTRAL CALI-FORNIA D/B/A UNIVERSITY MEDICAL CENTER

Jeffrey L. Henze, Atty., for the General Counsel.

G. Roger King and *Gregory W. Guevara, Attys. (Jones, Day, Reavis & Pogue),* of Columbus, Ohio, and *Miwon Yi, Atty. (Jones, Day, Reavis & Pogue)*, Los Angeles, California, for the Respondent.

James E. Eggleston, Atty. (Eggleston, Siegel & LeWitter), of Oakland, California, for the Charging Party California Nurses Association.

Thomas M. Sharpe, Atty. (Bennett & Sharpe), of Fresno, California, for the Charging Party Service Employees International Union.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Clovis, California, on October 7–9, December 9–12, 1997; March 3–6 and 10–13, and April 7–10, 1998,[1] pursuant to complaints issued by the Regional Director for the National Labor Relations Board for Region 32 on April 4, 1997 (Case 32–CA–15864), and on May 23, 1997 (Case 32–CA–15976), and which are based on

[1] All dates refer to 1996 unless otherwise indicated.

charges filed by California Nurses Association and Service Employees International Union, Local 752, Service Employees International Union, AFL–CIO (Unions or CNA or SEIU) on January 3, 1997 (Case 32–CA–15864), and on March 6, 1997 (Case 32–CA–15976). On June 9, 1997, the Regional Director for Region 32 issued an order consolidating cases, by which Cases 32–CA–15864 and 32–CA–15976 were consolidated for hearing (GC Exh. 1(s)). The consolidated complaint alleges that Community Hospitals of Central California d/b/a University Medial Center (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Principal Issues

I. Whether the General Counsel has established a prima facie case that Respondent is a successor employer.

II. If so, whether Respondent has rebutted a presumption of continuing majority support for the two unions involved in this case by showing:

(a) That University Medical Center was integrated into Respondent's system and operations to such an extent that the two bargaining units were eroded, fragmented, and otherwise were no longer appropriate.

(b) that at the time the Unions effectively demanded recognition and bargaining, Respondent entertained a good-faith doubt of the Unions' continuing majority status.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, CNA, and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California nonprofit corporation with its offices and principal place of business located in Fresno, California, where it operates an acute care facility. It further admits that as of October 7 it leases the facilities and equipment of an acute care facility formerly known as Valley Medical Center in Fresno, California. Respondent further admits that since it began leasing said facilities and equipment, Respondent, in the course and conduct of its business operations, has derived gross revenues in excess of $250,000 and has purchased and received goods or materials in excess of $5000 which originated outside the State of California. Accordingly, it admits, and I find, that Respondent is now, and has been at all times material here, an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that California Nurses Association and Service Employees International Union, Local 752, Service Employees International Union, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. Facts

1. Statement of case

On October 7, at 12:01 a.m., Respondent assumed control of Valley Medical Center (VMC) and renamed the facility University Medical Center (UMC). Because VMC had been a union facility and Respondent was a nonunion enterprise, at least so far as the California Nurses Association (CNA) and the Service Employees International Union, Local 752 (SEIU) were concerned, the primary issue in this case concerns whether Respondent was legally required to recognize and bargain with the two unions, upon receiving their demands. During the hearing of this case, the parties and witnesses used various words interchangeably to refer to the takeover of VMC: "merger," "transfer," "take-over," "transaction," "transition," and "acquisition." None of these expressions is precisely correct, but for consistency in this decision, I will use the term "transaction."

2. VMC—pretransaction

VMC was a large 288 bed medical facility, consisting of six floors or more with each floor divided into wings, referred to, for example as 4 East, or 4 West. It was a public facility owned and operated by Fresno County, and its employees were public employees, with all the benefits and burdens flowing from that status. While many of VMC's employees were represented by unions and grouped into 11 bargaining units, only three units are in direct issue in this case: unit 7, in which all registered nurses (RNs) were grouped; unit 5, in which certain service, maintenance, and janitorial classifications were grouped; and unit 12, in which certain clerical positions were grouped. CNA represented the RNs and SEIU represented the other two units.[3]

The record contains an organization chart for VMC reflecting the Fresno county board of supervisors at the top, followed by a county administrative officer, a director of the health services agency and the VMC hospital administrator. the various staff and line managers are also reflected (R. Exh. 26).

Approximately 1800 employees worked at VMC during the last 6 months before closure. However, as word of the possible transaction with Respondent leaked out of negotiations, many employees opted to leave VMC, either to transfer to other county jobs or to seek employment elsewhere in the public or private sector. This drain of experienced personnel who did not wish to await developments combined with a county-imposed

[2] Pursuant to a posthearing stipulation submitted to me by Respondent under cover letter dated May 13, 1998, I herewith admit into evidence R. Exh. 109, a memorandum of understanding (MOU) between unit 21 and the county effective June 6, 1994, through December 15, 1996. In addition, pursuant to the stipulation, I will permit substitution of new R. Exh. 104 for old R. Exh. 104 admitted into evidence at hearing.

[3] The parties stipulated that since January 15, 1976, CNA has been recognized by the county as the exclusive bargaining representative of county unit 7, and prior to October 7, such recognition has been embodied in successive labor agreements between the county and CNA; similarly, since May 14, 1974, SEIU has been recognized by the county as the exclusive bargaining representative of county units 5 and 12 and prior to October 7, such recognition has been embodied in successive labor agreements between the county and SEIU (GC Exhs. 2(b), (c)).

hiring freeze to place great burdens on those who remained at VMC. In the case of RNs, VMC used per diem and registry nurses to alleviate the nursing staff problems caused by the ebb and flow of the patient census and the degree of care patients required (aquity levels). In other cases, RNs were hired on a temporary basis for a specific length of time (traveling contract nurses). In addition, VMC used the float system to send qualified (i.e., cross-trained) RNs from one department to help out in another which was short-handed (see R. Exh. 63(h)).

VMC had the usual departments which one would expect to find in a county hospital and medical center. A first-class trauma center and burn center were perhaps the crown jewels of the operations, taking all who needed care, whether able to pay or not. The emergency department and operating rooms worked closely with the trauma center and burn center, and after patients were stabilized, they were transferred as needed to intensive care unit (ICU) or the more routine, medical/surgical units on the upper floors. As some persons left this world, so too did others enter it and VMC maintained a maternal care, birth, and a pediatric ward. Finally, the radiological and lab services departments cannot be ignored.[4]

Even the finest medical facility needs various behind the scenes employees to make it run. I have already mentioned the service, janitorial, and maintenance employees. In addition, VMC employed several security personnel, human relations analysts and clerks, and supervisors and managers. To be sure there was some duplication of functions, for example, there were a county and VMC personnel and human relations office. Moreover, the employees at VMC were civil service and in the case of the three units in issue here were further covered by a collective-bargaining agreement. In some cases, for example, in grievance and arbitration, the collective-bargaining agreement superceded county due process procedures.

Respondent presented evidence suggesting that VMC was inefficient in operation and losing large sums of money prior to the transaction. I was told that VMC lacked up-to-date information systems and other modern equipment. Its purchasing methods and recruiting practices were cumbersome and designed to produce delay and frustration. I note that the mission of VMC was to provide medical services to all who required them, including the indigent and incarcerated. I express no opinion on whether VMC was truly inefficient as such finding is not required by this decision and would involve the weighing of numerous collateral factors.

3. CNA/Fresno County negotiations

SEIU has two collective-bargaining agreements (MOUs) with Fresno County: (1) covering unit 5 (hospital, building, and food service employers)—effective June 6, 1994, to December 15 (GC Exh. 3); (2) covering unit 12 (clerical employees)—effective June 6, 1994, to December 15 (GC Exh. 5). CNA also had an MOU effective 1992 to April 1994. CNA and Fresno County ultimately reached a new agreement effective June 6, 1995, to December 14, 1997 (GC Exh. 4), after approximately 14 months of negotiations.

Unlike the SEIU agreements which were agreed to and in place prior to negotiations between Fresno County and Respondent over the transaction, CNA negotiations spilled over into the period when Fresno County was considering the transaction with Respondent. Once the possibility of this transaction entered the public domain in early 1995, the lives of many people became more difficult, including those on both sides trying to reach a new CNA labor agreement.

CNA was represented by Karen Short, a VMC RN who became highly controversial to say the least. She was joined late in the bargaining by Don Nielsen, an attorney, who was hired by CNA as a staff representative in May 1994 after bargaining had been in progress for some time. Short held a number of offices for CNA, besides chief negotiator, but she resigned all CNA nonpaid offices in early 1996 and unlike most of her VMC colleagues, never went to work for Respondent. Short never testified in this case, but Nielsen did testify as a General Counsel's rebuttal witness. These two negotiators were assisted by an employee committee numbering 10 to 15, which varied depending on the demands of business and personal factors.

The county negotiators were headed by Ralph Jiminez, a high county official who did not testify. He was assisted by a number of others including Henry Perea, then the director of human resources at VMC and a General Counsel's rebuttal witness, Amy Tobin and Ralph Kinder, then VMC nursing supervisors who were hired subsequently by Respondent and called as important witnesses for Respondent, and Dee Ann VonBerg, a senior personnel analyst for Fresno County who testified several different times in the instant case.

In any event, negotiations were protracted and acrimonious. CNA perceived that the county was attempting to foist upon bargaining unit members a number of "take-aways." So CNA negotiators on the one hand had to resist these perceived "take-aways," while on the other hand, they had to offer their own proposals, such as increased cross-training to allow RNs floating to a new department to know what to do. During the negotiations, both Short and another CNA negotiator made personal attacks upon certain members of the county team. These two uncalled for remarks occurring at different times during the bargaining, filtered down to certain members of the CNA bargaining unit, who strongly disapproved of these and other perceived unfair tactics. Several RNs, Jenny Rohan, Janet McMillan, Sandra Yovino, all Respondent witnesses, and several others wrote to Nielsen complaining about Short and the protracted negotiations in general. While neither the original nor any copy of the letter can be found, Nielsen's reply to the letter dated August 30, 1994, is in the record (R. Exh. 43).

The reaction of the county negotiators to the personal attacks was to file an unfair labor practice with the county,[5] and to suspend negotiations for a brief period. In his testimony for the General Counsel, Perea made it clear, contrary to evidence

[4] VMC also contained a number of clinics, i.e., separate medical facilities such as a children's health center. These clinics were located in some cases inside VMC or in other cases, on its campus in separate structures, or in still other cases in rural locations far removed from VMC by several miles. Apparently several of the clinics in and around VMC were conveyed to Respondent as part of the transaction.

[5] I refused the offer of this unfair labor practice charge (R. Exh. 96) which never led to any complaint and was promptly dropped once a new agreement was reached.

from Respondent, that at no time during negotiations did the county consider either withdrawing recognition from CNA or refusing to continue bargaining.

Sometime after a new agreement was reached and after it became clear that the county intended to close VMC, CNA and county representatives went back to the bargaining table to conduct "effects bargaining." Apparently there was no animosity left over from negotiations over the MOU, because Nielsen was able to achieve a number of concessions from the county such as preferences for job transfers to other county jobs for those who wished to stay, such as a "golden handshakes" for those 2 years or less away from retirement (the county agreed to give those employees the necessary credit to retire), and such as an agreement for those employees leaving to cash out their leave bank of accrued vacation time. After obtaining these and other concessions, CNA joined with SEIU in attempting to influence negotiations between the county and Respondent which negotiations eventually led to the transaction.

4. Respondent pretransaction

Respondent, a private, nonprofit corporation, is governed by a board of directors which makes general policy decisions. Its chief executive offices (CEO) was Bruce Perry who was replaced at some point during the time material to this case, by Dr. Phil Hinton. While neither Perry nor Hinton testified, several other members of Respondent's highest management did testify. For example, Marilyn Hawkins, executive service leader, Michael McGinnis, chief financial officer, and Eileen McCloskey, service integrator for human resources all testified as Respondent's witnesses. Respondent's pretransaction organizational chart is contained in the record (R. Exh. 6). By October 7 Respondent had made certain changes in its organizational chart (R. Exh. 7).

Respondent traces its origins in Fresno under another name back to 1897. Over the years it grew and expanded in the Fresno area. Its prime campus and corporate headquarters is Fresno Community Hospital (FCH), a 359 bed acute care facility located in downtown Fresno (city and county of Fresno are not to be confused). A second facility is Clovis Community Hospital, a 120 bed acute care facility located in an adjoining suburb of Fresno City. Respondent also owns and operates a number of outpatient facilities and long-term care facilities (R. Exh. 2, pp. 2–4).

With one exception, Respondent operates its facilities on a nonunion basis. The exception concerns a unit of Operating Engineers Local 39, which attends to the boilers at FCH, and has maintained a collective-bargaining relationship with Respondent for about 20 years. The collective-bargaining agreement for Local 39 effective July 1, 1995, through June 30, 1998, is contained in the record (R. Exh. 65).

Pretransaction, Respondent employed about 3300 employees at its various facilities and corporate headquarters. As a result of acquiring VMC, Respondent hired about 1200 additional employees, most of whom had been former employees at VMC. With respect to RNs, some VMC employees had worked per diem at Respondent's facilities and some Respondent RNs had worked per diem at VMC, all pretransaction. In addition, VMC and Respondent had moved patients back and forth on a limited basis when one facility or the other had more advanced equipment.

About 1 or 2 years before the transaction, Respondent had engaged in some restructuring of its facilities and personnel. While the exact details are not clear, some VMC employees who learned of the restructuring, felt that Respondent had not treated its RNs and other relevant classifications kindly during a period of upheaval and turmoil.

Respondent portrayed itself during hearing as having a singular philosophy by which it governed its organization. Called "Shared Governance," this philosophy sought to give Respondent's employees both a voice through various committees and councils in making decisions which would affect them and accountability for these same decisions. Respondent operated its organization on an integrated, systemwide basis. Through the use of employee handbooks and new employee orientation, Respondent sought to persuade all new hires, they were important parts of the whole, rather than merely cogs in a machine. Many of the committees and councils operated on a systemwide basis, as did the wage schedules, work schedules, and other terms and conditions of employment. Respondent even operated a systemwide grievance system for employees with complaints. However, the final step of the grievance system utilized an in-house panel of supervisors and human resources representatives without resort to an independent arbitrator. For the losing employee at the final stage, there was no appeal.

Like Respondent's employees, Respondent's patients were also said to be treated differently than they would be elsewhere, at VMC, for example. Thus, a system called "patient focused care" was used by Respondent by which patients were given more control, allegedly, in designing their own medical treatment plan. As part of this plan, as I understand it, Respondent also reduced in some cases, the number of RNs assigned to a particular patient and, in their place, substituted lesser trained personnel, all in the name of greater efficiency, to reduce costs and speed the patient on the way to faster recovery.

5. Respondent's pretransaction probe of VMC's books, records, and practices

In late 1994 or early 1995 Respondent decided to consider whether it was feasible and/or desirable to assume control of VMC.

To answer these questions, Respondent unleashed a troop of outside investigators, and in-house committees, teams and task forces to conduct what was called "due diligence." None thought it important even to consider the role of the CNA and SEIU in the transaction and integration of over a 1000 employees into Respondent. The reason for this omission is based upon the assumptions of the various investigators that to properly integrate the formerly unionized employees into Respondent, there would be no union.

a. Outside investigators

There were two independent investigations conducted: one report is in the record and, for unknown reasons, the other isn't. In October 1994 a management consultant called American Practices Management (APM) began looking into the possibility of a transaction. By May 1995 APM compiled and issued its written report contained in the record as Respondent's Ex-

hibit 21. There, after considering a number of options for VMC, such as status quo, downsizing, or closing, the report concluded at page 45, that the option of creating a regional medical network (i.e., privatizing) with Respondent was the most desirable solution for Fresno County. This report was made available to the public and as I will report below, CNA, SEIU, and various community organization in Fresno disagreed with it's ultimate conclusion and decided to oppose it, even after the county and Respondent began to implement it.[6]

A second report was compiled by the accounting firm of Arthur Anderson. As noted above, this report is not in the record, and not much detail is known about it. According to Respondent witness, William Grigg, an official of Respondent's in the area of budgeting, finance, and accounting, Arthur Anderson was retained to interpret financial data from the county and to develop financial and operational models as to how the combined organizations would work. That is, Arthur Anderson assumed that VMC would be fully integrated into Respondent's system, all administrative departments would be fully merged, employees would be subject to unlimited floating between facilities, and that VMC would not exist as a stand alone facility.

b. In-house investigators

Respondent first established a project team, under direction of McGinnis. Its job was to obtain financial and other data from the county and to examine and analyze this data to see if the transaction was desirable for Respondent. Its work continued until the end of 1995, when it issued a report containing, among other matters, the question of at some point, addressing the existence of the Unions at VMC.

Another team established by Respondent was the steering team, containing 4–6 members including CEO Perry, CFOs McGinnis and Hawkins. Established in early 1995, its job apparently was to consider in greater detail those issues facing Respondent, if it assumed control of VMC.

By early 1996 the transaction began to look more likely from Respondent's point of view and a transition team was established with the goal of making the transaction work, if it happened. Numbering about 12, membership of this group included Hawkins, McCloskey, Amy Tobin, and Bruce Kender (by then both former nurses manager at VMC, having been hired by Respondent). Its existence lasted for 8 to 10 months, ending about November, and covering subjects such as staffing, management, physician services, and other issues. A primary issue was, according to Hawkins, if acquired, whether VMC would be operated as a separate facility or as part of Respondent's integrated system. Eventually, after analyzing various data and meeting with county representatives, the transition team decided VMC was to be part of Respondent's integrated system.

Two other groups played a role in the transaction: first Respondent's negotiating team which negotiated the details of the transaction as discussed below, and the human relations task force (HRTF) which reported to the transition team. The duties of HRTF was to arrange for the hire of VMC and other employees by Respondent. By June the transaction was all but assured. Accordingly, the HRTF set up interviews, both applicants and interviewing panels, and correlated the duties of VMC employees to Respondent's jobs, so the former merely had to find their VMC classification on a list and the corresponding Respondent's job code and classification would be evident. In addition, the HRTF arranged for processing of new employees, orientation, record updating and other such chores.

6. The Respondent/Fresno County negotiations and resulting transaction

Dated August 27 the master agreement between the county of Fresno and Respondent for the instant transaction is in the record (GC Exhs. 11(a)–(e)). The agreement includes various leases (property and equipment), funding agreements, and purchase of service agreements. The agreement was reached after several months of negotiations between a small group of Respondent's top management and a group of county and VMC officials. It was approved by final vote of the Fresno County board of supervisors in August and by final role of Respondent's board of directors in September.

Essentially, the parties agreed to continue operation of the VMC facility (now called UMC) for 5 years, at the end of which time the building is supposed to close as a hospital and revert to the county for such use as it sees fit. During the 5-year period beginning October 7, Respondent is consolidating its operations in and around the campus of FCH where it has acquired a considerable amount of land from the city of Fresno. Set for completion by October 2001, the project is extremely ambitious and involves the construction of new buildings and refurbishing of old. It is contingent upon Respondent's obtaining the necessary public and private financing, a subject Respondent's witnesses seemed confident to predict. In the event the time limits are not realized, Respondent can seek an extension from the county, but if granted, any extension would involve the payment of penalties.

The negotiators for the county as public employees were subject in a broad sense to direction and control by the Board of Supervisors. The Unions had a few sympathizers on the Board who were lobbied by union representatives. At first, the Unions attempted to stop the transaction entirely and maintain the status quo. After the Unions failed to stop the transaction by contacts with the board of supervisors, they tried to stop the transaction with different tactics, to be discussed below. However, at some point, union representatives changed the focus of their activities with respect to the board of supervisors to get the best possible deal for bargaining unit employees. First, they attempted to have the board of supervisors require as a condition of sale, that Respondent recognize and bargain with the Unions. This position was rejected and in its place, the county required that recognition of the Unions occur as may be required by law. Next, the Unions sought guaranteed jobs with Respondent for all bargaining unit employees who desired jobs. This too failed as the two sides to the transaction agreed only that Respondent would give preferences to all VMC employees who applied, but said VMC applicants would be considered in

[6] At p. 26 of R. Exh. 21, in the context of discussing why VMC would have difficulty reducing its expenses and perhaps remaining in existence, the Report mentions at par. 4, "Hostile Union Relationships." More specifically, the authors fault one [unnamed] union at VMC which allegedly threatened to "aggressively fight any effort to redesign jobs and reduce labor expenses."

accord with Respondent's preexisting hiring criteria.[7] In late August or September, Respondent hosted a job fair for VMC employees who desired to learn about Respondent before applying. Once the pool of VMC applicants had been exhausted, Respondent began to recruit from the public at large for the few remaining jobs either at UMC or created elsewhere with Respondent as a result of the VMC acquisition.

Before VMC employees could apply at Respondent, they had to be informed of what pay and benefits they could expect. In general, Respondent's policy was to pay the same wage for comparable work. If a Respondent classification was paying more than a comparable classification at VMC, the hired VMC employee received the higher wages. Where the Respondent's classification was paying less than the comparable classification, the hired UMC employee also received the higher wage, but was then "red-lined," i.e., his wage was frozen until such time as the new employee's wages reached parity with others in the same Respondent's classification.

As to benefits, a summary of benefits offered by Respondent to its employees is included in this record (R. Exh. 36). Respondent called a witness at hearing named Richard Lord, an official in Respondent's human resources department responsible for the design and administration of all corporate benefit plans. At some point, Respondent prepared a document comparing and contrasting the benefits paid by VMC to its employees with the benefits paid by Respondent to its employees (R. Exh. 37). McCloskey, also from Respondent's human resources, explained in her testimony how the summary came to be prepared. [During negotiations between the county of Fresno and Respondent over the transaction], "The [County] negotiators wanted to be sure that we were going to offer these employees—these new community employees benefits that would be comparable to what they were getting with the county of Fresno, so they asked us to prepare a comparison and gave us information on their benefits so that we could do that." (Tr. 1526.)

7. The coalition to save VMC

Before the board of supervisors could approve the transaction and before it could even consider it seriously, they were required by California law to hold a series of public hearings called the Bielenson Hearings, at which the public could present its point of view into the process. These hearings heard from a number of persons and organizations with strong feelings about the proposed transaction. CNA took a strong position in opposition to the transaction as did SEIU. Both Unions and a number of community organizations entered into a coalition called the Coalition to Save VMC with similar goals. In support of its point of view, the coalition held marches, appeared on radio and television, circulated a petition (CNA Exh. 40) and (R. Exh. 79) (seeking to have the issue placed on a referendum) and ultimately filed a legal suit, all for naught, although the litigation apparently is still in progress.

Respondent presented as witnesses several former CNA bargaining unit employees at VMC who expressed disagreement with CNA over its strategy to oppose the transaction. Some of these witnesses claimed not to have been consulted to begin with on the origins of the CNA opposition but most seemed to object more specifically to the expenditure of time, energy and money on what was essentially a losing cause. Respondent presented these witnesses as part of its evidence to show Respondent's good-faith doubt of the CNA's majority status. More about this issue will follow in the analysis and conclusions section of this decision.

8. UMC

As UMC sprang to life on October 7, the public at large and employees noticed few, if any significant changes. Hawkins, one of Respondent's highest leaders, opined that UMC patients came from the same general population as did the patients for VMC (Tr. 347). In addition, the same facilities such as the emergency department, trauma center and burn unit were all located and operating as before. There was no evidence that police or paramedics were bringing persons needing immediate medical care to any different location. The medical/surgical floors were also located and operating same as before.

The over-all employee complement has been reduced at UMC to about 1500 employees compared to 1800 at VMC. The great majority of UMC employees had previously worked at VMC.

B. Analysis and Conclusions

1. The General Counsel's prima facie case

I find that the General Counsel (and Charging Parties) have established a strong prima facie case that Respondent is a successor to VMC. In *Sunrise Nursing Home,* 325 NLRB 380, 381 (1998), the judge recited applicable law in his Board approved decision:

> An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "substantial continuity between the enterprises." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), citing inter alia, *NLRB v. Burns International Security Services*, 406 U.S. 272, 290 fn. 4 (1972). Also see *Task Force Security & Investigation*, 312 NLRB 412 (1993).
>
> The Supreme Court in *Fall River*, supra at 43, summarized the factors relevant to determining continuity as follows:
>
> > [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors, and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.
>
> The court further instructed that these characteristics of the substantial continuity factor were to be assessed primarily from the perspective of the involved employees, that is, "whether '[these] employees who have been retained will . . .

[7] There is no allegation in this case claiming that Respondent discriminated in the hiring of VMC employees for unlawful reasons.

view their job situation as essentially unaltered.'" Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).[2] Further, although each factor must be analyzed separately, they must not be viewed in isolation and ultimately, it is the totality of the circumstances which is determinative. See *Fall River*, supra.

Moreover, as recognized in *NLRB v. Burns International Security Services, Inc.*, supra, successorship may depend upon the continued appropriateness of the bargaining unit. As stated by the Supreme Court in *Burns* at 280.

> It would be a wholly different case if [the successor's] operational structures and practices [were so different that the existing] bargaining unit was no longer an appropriate one.

In construing this provision, the Board has held that in "all of the Board cases in which successorship was found are predicated on the finding that the predecessor's bargaining unit remained intact under the successor and continued to be an appropriate unit. . . . A determination must therefore be made as to the integrity of the [predecessor] bargaining unit after the transfer. . . ." *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973). While the Board has held subsequent to *Burns*, supra, that employees acquired from a predecessor "themselves must constitute an appropriate unit," *Irwin Industries*, 304 NLRB 78 (1991), the Board, however, has also held that the Act does not require an evidently only, ultimately, or most appropriate unit, but only that it be at least appropriate in nature. *Vincent M. Ippolito, Inc.*, 313 NLRB 715 (1994); and *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950).

[2] Also see *Nephi Rubber Products Corp. v. NLRB*, 976 F.2d 1361 (10th Cir. 1992).

In *Briggs Plumbingware v. NLRB*, 877 F.2d 1282, 1285–1286 (6th Cir. 1989), the court explained that the successor determination is important because of the presumption that follows: that the union with which the predecessor bargained continues to enjoy majority status with the successor's employees.

Of all the factors bearing on successorship, perhaps the most important is a comparison of the workforce of the predecessor and the alleged successor. If a majority of the latter's employees had previously been employed by the former there is usually a successorship, where the bargaining unit of the predecessor remains appropriate. See *Control Services*, 319 NLRB 1195 (1995). In *Trident Seafoods*, 318 NLRB 738 (1995), the Board stated, "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness. The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate [and] [t]he evidentiary burden is a heavy one." [Citation omitted.]

The fact that Respondent, a private, nonprofit enterprise took control of VMC, a public sector employer owned and operated by the county of Fresno does not change the normal rules of successorship. See *Lincoln Park Zoological Society*, 322 NLRB 263 (1996), enfd. 116 F.3d 216 (7th Cir. 1997).

Next, I find that there is "substantial continuity" between VMC and Respondent. *Northern Montana Health Care Center*, 324 NLRB 752 (1997). Thus, Respondent operates an acute care health facility, in the same location, using essentially the same equipment. The general pool of patients remains the same[8] and they are treated in the same emergency department, burn center and trauma unit, among other units continued by Respondent.

Respondent opened UMC with no hiatus,[9] i.e., interruption in services. In fact, throughout the hearing Respondent witnesses used the term "turnkey" to describe UMC as of 12:01 a.m. on October 7. This expression means that all or most of the equipment used by VMC to provide medical services to the public remained intact and available for immediate use by Respondent.[10]

As to supervisors, I find that Respondent hired many of the supervisors who worked with bargaining unit employees at VMC (R. Exh. 56). In fact, some of these supervisors testified as Respondent's witnesses. I note the case of *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995), where the Board cites the case of *Boston-Needham, Industrial Cleaning Co.*, 216 NLRB 26, 27 (1975), enfd. 526 F.2d 74 (1st Cir. 1975), for the proposition that a respondent cannot escape its obligation as a successor by employing different supervisors. To this, I add that, in some cases, former VMC supervisors have been moved around in Respondent's empire, perhaps not always working all of their time with UMC. Where this practice exists, no effect on the successorship can be found.

In sum, I find that Respondent has continued to operate the business of the predecessor in essentially unchanged form. See *Torch Operating Co.*, 322 NLRB 939 (1997).

I turn now to the former VMC bargaining unit employees. As to the CNA represented employees, Respondent hired a substantial and representative complement of RNs as of October 7. As to the SEIU represented employees, Respondent hired a substantial and representative complement of employees within the next 3 months, and in any event prior to the SEIU demand for bargaining on January 13, 1997. See *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 644–647 (2d Cir. 1996). The employees, both CNA and SEIU, were performing at UMC essentially the same jobs under the same working conditions as before. See *Harter Tomato Products Co.*, 321 NLRB 901, 902 (1996).

[8] To the extent, there is a change of emphasis to attract more insurance-covered patients as compared to the indigent and prisoners which were a large part of the patients of VMC, this change in emphasis does not affect the successorship. See *Premium Foods*, 260 NLRB 708, 715 (1982), enfd. 709 F.2d 623 (9th Cir. 1983).

[9] Compare, *CitiSteel USA v. NLRB*, 53 F.3d 350, 356 (D.C. Cir. 1995).

[10] Of course, I recognize that as the months have passed, Respondent has upgraded or replaced some of the equipment at UMC or equipment located elsewhere which can be used by employees of UMC. Perhaps the best example of this is computer technology, affecting patient records and other administrative and medical tasks. Medical equipment has also advanced rapidly, but none of this refutes the substantial continuity of Respondent's business, the measure of which is to be taken at the time of takeover.

a. Unit 7 (RNs)

Respondent stipulated that since January 15, 1976, CNA has been recognized by the county of Fresno as the exclusive bargaining representative of county unit 7 and at certain times prior to October 7, such recognition was embodied in successive collective-bargaining agreements between the county and the Union (GC Exh. 2, par. 20, p. 7). As of October 15, Respondent employed 307 nonsupervisory RNs at UMC of whom approximately 278 were previously employed at VMC in unit 7 job classifications (GC Exh. 2, par. 5, pp. 45).

b. Unit 12 (clerical employees)[11]

Respondent stipulated that as of January 13, 1997 (date of SEIU's demand) there were a total of 202 persons employed in unit 12 replacement classifications of whom 110 were previously employed in VMC" unit 12 job classifications (GC Exh. 2, par. 6).

At p. 27 of its brief, Respondent states, ". . . with respect to units 7 and 12, as of the earliest possible date upon which a bargaining obligation may have arisen on the part of [Respondent] with respect to such units. . . October 7 with respect to CNA and January 13, 1997 with respect to SEIU, a majority of the employees in replacement classifications in each of those units at UMC had been previously employed in Unit 7 or 12 respectively at VMC" (GC Exh. at 4–5 (stips. 5–6).

c. Unit 5 (hospital, building and food service employees)

Respondent stipulated that as of January 13, 1997, there were a total of 187 employees classified by Respondent as being employed in unit 5 replacement classifications, of whom 83 were employed in VMC unit 5 job classifications on October 6. At page 28 of its brief, footnote 8, Respondent abandons a certain argument it made at hearing with respect to six former VMC employees who retired from the county 2 days prior to October 7. The effect of this change in position is to increase the 83 employees to 89 employees. This leaves still in question 14 of the employees classified by Respondent as being unit 5 replacement employees. According to the General Counsel and the Charging Parties these 14 employed as medical assistants should be excluded from the total number of employees counted to establish majority hiring status in unit 5 replacement classifications at UMC as of January 13, 1997.

The medical assistants referred to above and employed by the county at VMC in its various clinics were not included in VMC's unit 5 job classifications, and therefore were not listed by VMC on the VMC bargaining unit report as of October 6 (R. Exh. 14). Effective October 6, all 14 medical assistants were terminated by the county and were subsequently employed by Respondent as "Technical Partner-Patient Care" as of January 13, 1997. By decision of Respondent's officials, "Technical Partner-Patient Care" is a unit 5 replacement classification. Of the 14, approximately 8 were assigned by Respondent to the same clinics they worked for under VMC and the others were assigned to different clinics (GC Exh. 2, stips. pars. 25–31).

[11] Although I will recommend below that the SEIU allegations be dismissed, I include this analysis to avoid remand in the event the dismissal is reversed.

At page 28 of its brief, Respondent forthrightly concedes that if the General Counsel is correct and the 14 are not counted, this fact reduces the 187 to 173 persons in unit 5, of whom 89 were previously employed in unit 5 classifications at VMC, thereby establishing a majority of former unit members in the new unit (GC Exh. 2, stip. par. 4(b)). At page 30 of its brief, Respondent cites *Hydrolines, Inc.*, 305 NLRB 416 (1991), for the proposition that a successor may add employees: "It may add, eliminate or change job classifications." To understand the Board's position, the statement quoted in *Hydrolines* should be placed in proper context. In the context of discussing the form of a union's bargaining demand [about which there is no issue in the present case], the Board stated, page 420,

> . . . in a successorship situation, the [U]nion, by making a bargaining demand, is attempting to preserve its status as the bargaining representative of an already defined unit, or that portion of the unit which has been conveyed or preserved. The successor, however, may add employees. It may add, eliminate or change job classifications. It may have plans to expand or change its operations. The union may be unaware, or at least uncertain, as to the successor's plan for its hiring and operations.

To put the Board's statement in additional context, I note the case of *Northern Montana Health Care Center*, supra, where the judge wrote that variations in the classifications included or excluded by the successor in the new units are generally inconsequential (citations omitted).

Based on the above discussion, I have considered Respondent's argument that the medical assistants should be counted and I reject it. In agreement with the General Counsel, I find that Respondent effectively "diluted" the former unit representation of the replacement unit by classifying the 14 former medical assistants as "technical partner-patient care." Cf. *Bridgeway Oldsmobile, Inc.*, 281 NLRB 1246, 1247 (1986), sup. decision, 290 NLRB 824 (1988).

d. Additional Respondent arguments and conclusions

Respondent follows the meritless argument addressed above by next contending, brief, page 58, inconsistently that the former units represented by CNA and SEIU were significantly reduced under Respondent. Respondent's argument is based primarily on *Nova Services Co.*, 213 NLRB 95 (1974); and *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), enfd. 498 F.2d 680 (D.C. Cir. 1974). In *M. S. Management Associates,* 325 NLRB 1154 (1998), the Board addressed both of these cases as it reversed the ALJ's failure to find successorship. As to *Nova Services*, the Board questioned its continued precedential value. Id. 1155 fn. 7. As to *Atlantic Technical Services Corp.*, the Board characterized it as "factually unique." Both cases were distinguished form the facts in *M. S. Management Associates,* as I distinguish them from the instant case, and find that even though certain elements of the units at issue remained with the county after takeover, I find no "inappropriate fragmentation of a previously homogenous grouping of employees." Furthermore, I find any such variation is inconsequential. *Northern Montana Health Care Center*, supra.

In *Derby Refining Co.*, 292 NLRB 1015 (1989), the Board explained that when a successor employer hires, as a majority of its employees, the former unionized predecessor's employees, the presumption arises that a majority of the successor's employees also support the union. As the Supreme Court stated in *NLRB v. Burns Security Services*, 406 U.S. 272, 278–279 (1972), the mere change in ownership, without an essential change in working conditions, would not be likely to change employee attitudes toward representation. The board continues, explaining that the presumption is necessary to promote stability during changes of ownership and to reduce industrial strife. Both the union and the employees are vulnerable during this period and hard-earned bargained-for rights can easily by diminished. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 39 (1987). Employees, especially during such times, are worried about retaining their jobs and may shun the union if they feel it will help their chances of doing so. If no presumption existed, corporate transformation could be used to avoid the union and exploit employees' fears. Id. Such a situation would not be conductive to industrial peace.

CNA made a written demand for recognition and bargaining on August 16 (GC Exh. 6), almost 2 months before Respondent took control of VMC. On August 26, Respondent made a pro forma acknowledgement, saying the demand had been forwarded to legal counsel for "appropriate action" (GC Exh. 7). On October 29, CNA made a second demand for recognition and bargaining (GC Exh. 8), and on November 25, CNA made still a third request (GC Exh. 9). As previously noted, on January 13, 1997, SEIU made a single demand on behalf of units 5, 12, and 21 for recognition and bargaining (GC Exh. 10).

In I. P. Hardin, *The Developing Labor Law 788* (3d Ed. 1992), the author explained the effect of a premature demand.

> In *Grico*, the Board reemphasized that "a request for bargaining is continuous and need not be repeated."[111] Once a demand has been made, a bargaining obligation will be established if, at any time thereafter, the employees of a predecessor constitute a majority of a representative complement of the new employer's work force.[112] The Supreme Court, in *Fall River*, approved of the Board's "continuing demand" rule.[113]

[111] 265 NLRB at 1345 n. 9, 112 LRRM at 1149 n. 9.

[112] See also *Royal Midtown Chrysler Plymouth*, 296 NLRB No. 135, 133 LRRM 1165 (1989); *Fremont Ford Sales dba Fremont Ford*, 289 NLRB 1290, 131 LRRM 1074 (1988); *Cuello Indus. dba Scroll Casual*, 278 NLRB 10, 122 LRRM 1264 (1986); *Redok Enters.*, 277 NLRB 1010, 120 LRRM 1337 (1985); *General Processing Corp.*, 263 NLRB 86, 110 LRRM 1479 (1982).

[113] *Fall River Dyeing & Finishing Corp. v. NLRB*, supra note 106, at 52–53, 125 LRRM at 2451.

Based on this authority, I conclude that for CNA October 7, was the relevant date because the evidence at hearing showed all or most of Respondent's hiring to staff UMC had been completed by that date. I also find that the two subsequent letters sent by CNA to Respondent were, without any legal effect. As to SEIU, January 13, 1997, was the relevant date. As to both Unions, I conclude that Respondent hired a majority of bargaining unit employees as of the effective date of the demands and I again find that they and the General Counsel have established strong prima facie case that Respondent had a legal duty to recognize and bargain with them for the units in question.

In conclusion, I have considered all other arguments raised by Respondent which bear upon the General Counsel's prima facie case and find them lacking in merit. I close this segment by again turning to *Northern Montana Health Care Center*, supra, where the judge quoted from *David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157, 161 (6th Cir. 1989).

> Nothing in the record disclosed that [the employer] would have recognized and bargained with the Union even if the unit [had not been at variance].

I apply that statement to this case.

2. Respondent's affirmative defenses

The General Counsel makes no claim in this case that Respondent was not free to set initial terms and conditions of employment. See *Mariott Management Services,* 318 NLRB 144 (1995); and *Planned Building Services,* 318 NLRB 1049 (1995). And I have recited above, the general policies regarding pay and benefits used by Respondent to hire VMC and other new employees. Later, as Respondent purported to "integrate" the former VMC unionized employees into its operations, Respondent made certain changes at UMC in RN schedules, and in other terms and conditions of employment. However, none of these changes is effective to defeat Respondent's successorship obligation. *Sierra Realty Corp.*, supra, 317 NLRB at p. 835.

a. Adverse inference[12]

On or about March 24, 1998, the General Counsel served a subpoena duces tecum on Respondent, returnable April 7, 1998 (day 16 of the hearing) and calling for, inter alia, any documents tending to relate to Respondent's alleged good-faith doubt of CNA's majority status as of October 7, and more specifically, any such documents tending to show the reason or reasons why Respondent decided not to recognize CNA as the representative of the RNs at UMC. The General Counsel also recited in the subpoena that in case of disputes over privileges, the disputed documents could be presented to the ALJ for in camera review (GC Exh. 34).

This subpoena was critically important because Respondent's witnesses Hawkins, McGinnis, and particularly McCloskey, all testified that while they were aware of certain recommendations presented to CEO Hinton and the board of directors, none of them was present for the final decision not to recognize the Unions. Moreover, none knew the reasons for this decision, who made the decision, nor when exactly it was made. This failure of proof left a yawning gap in Respondent's evidence which General Counsel sought to fill. Perhaps the General Counsel could be faulted for waiting so long to seek this important evidence, but that is not the issue before me. Rather Respondent refused to submit the documents to me for in camera review, though ordered to do so. Rather it made its own review of the

[12] I place this segment of my decision here because I believe Respondent's affirmative defenses must be evaluated in the context of this adverse inference which arose at hearing as a result of Respondent's own conduct.

documents in question and made redactions which Respondent thought was appropriate. As furnished to the General Counsel with redactions intact, the documents were admitted into the record (GC Exh. 35 (a)–(d)).

In an end-of-the case discussion about this issue, Attorney King assured me that the documents are not relevant, that ["most"] of the material edited out concerns "financial terms and conditions," and "negotiations with the county of Fresno that had nothing to do with this case" (Tr. 3938). In his extended remarks on this issue, Attorney King never made clear why the allegedly innocuous and irrelevant material he described should be covered by attorney-client and work product privileges, why a protective order or other alternative would not suffice to protect the interests asserted by King, and most importantly, why the judge rather than a party should not be the person to decide what material must be turned over.[13]

In *Pioneer Hotel & Gambling Hall*, 324 NLRB 918, 927 (1997), the Respondent refused to comply with the General Counsel's subpoena duces tecum. In drawing an adverse inference, the judge stated,

> As to whether this Respondent or any party to any cause can decide for itself whether to comply with a presumably valid subpoena duchess tecum, which has been properly served, I find that such discretion would hobble if not destroy the process under which we labor.

Even if the General Counsel had not subpoenaed the records in question, I may have found it appropriate to draw an adverse inference, based on Respondent's failure to prove who made the decision not to recognize and bargain with the Unions, why and exactly when said decision was made.

I find that Respondent's failure to produce the documents in question, the best evidence of why exactly, Respondent failed to recognize the Unions, justifies an inference that if such evidence had been produced, it would have been unfavorable to Respondent. *J. Huzinga Cartage Co.,* 298 NLRB 965 (1990). In *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 563 (7th Cir. 1993), the court stated: "The failure of an employer to produce relevant evidence particularly within its control allows the Board to draw an adverse inference that such evidence would not be favorable to it." This rule is even more applicable herein because the Respondent failed to produce the evidence pursuant to a subpoena. In *Auto Workers v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972), the court stated:

> The reason why existence of a subpoena strengthens the force of an inference should be obvious. If a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party.

[13] In camera inspections are well-established procedures in the Federal courts, *U.S. v. Smith*, 123 F.3d 140, 151–152 (3d Cir. 1997), and have been approved by the Board. *Brinks, Inc.*, 281 NLRB 468, 470 (1986).

See also *Douglas Aircraft Co.*, 308 NLRB 1217 fn. 1 (1992); *International Automated Machines*, 285 NLRB 1122, 1123 (1987); and *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966 (D.C. Cir. 1988).

So with Respondent already facing a heavy burden by virtue of its opponents' strong prima facie case, Respondent is now two steps behind by virtue of an adverse inference.

b. Single facility presumption[14]

In *The Developing Labor Law*, p. 197 (3d Ed., 1997 Cum. Supp. 1998), the Editors provide a helpful starting point for discussion of the pending issue.

> The Board continues to approve single-facility units in the health care industry,[50] and prior judicial disapproval of a single-facility presumption in the health care context has been acknowledged by the circuit involved to have been undercut by the Supreme Court's decision in *American Hospital Ass'n. v. NLRB*.[51] The presumption can be rebutted where the separate facilities are in close proximity and functionally integrated and there is employee interchange.[52]

[50] *Children's Hosp. of San Francisco*, 312 NLRB 920, 144 LRRM 1189 (1993).

[51] 499 U.S. 606, 137 LRRM 2001 (1991). See also *California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 152 LRRM 2593 (CA 9, 1996), *enforcing sub nom. Children's Hosp. of San Francisco*, 312 NLRB 920, 144 LRRM 1189 (1993); *Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 146 LRRM 2385 (CA 2, 1994), *enforcing* 310 NLRB No. 207, 143 LRRM 1191 (1993); *Bry-Fern Day Care Ctr. v. NLRB*, 21 F.3d 706, 146 LRRM 2041 (CA 6, 1994), *enforcing* 309 NLRB No.53, 141 LRRM 1316 (1992); *Hotel, Hosp., Nursing Home & Allied Servs, Local 144 v. NLRB (Brooklyn Hosp. Ctr.)*, 9 F.3d 218, 144 LRRM 2617, 2621 (CA 2, 1993), *enforcing* 309 NLRB 1163, 143 LRRM 1094 (1992); *Presbyterian Univ. Hosp.*, supra note 45.

[52] Compare Hartford Hosp., 318 NLRB 183, 150 LRRM 1262 (1995) (despite physical proximities, employees were physically and functionally segregated and had little interchange or interaction) with Lutheran Welfare Servs. of Northeastern Pa., 319 NLRB 886, 151 LRRM 1029 (1995) (facilities less than 200 feet apart, functionally integrated, and common policies).

However, Respondent has a heavy evidentiary burden to prove that the historical units are no longer appropriate and the General Counsel has no burden to prove that the units remain appropriate. *Four Winds Services,* 325 NLRB 632 (1998) (citation omitted). As noted by the judge in *Montauk Bus Co.*, 324 NLRB 1128, 1135 (1997),

> . . . in *Trident Seafoods, v. NLRB*, 101 F.3d 111, 114 (D.C. Cir. 1996), the court held that in a successorship case 'there is

[14] This argument does not seem to apply to CNA where Respondent's bargaining obligation and its takeover of VMC occurred simultaneously. All or most of the factors relied on by Respondent to rebut the single facility presumption constitute unilateral changes in the terms and conditions of employment of CNA represented employees, which Respondent could properly make only after recognition and bargaining. See *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991): and *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4th Cir. 1995). Notwithstanding this view, I will consider the argument as it applies both to CNA and SEIU.

> a strong presumption favoring the maintenance of historically recognized bargaining units." The court went on to state that the Board is "reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act."

I find that the units in question are not repugnant to Board policy nor so constituted as to hamper employees in fully exercising rights guaranteed by the Act.

To determine whether the presumption has been rebutted, the Board looks at such factors as central control over daily operations and labor relations, including the extent of local autonomy: similarity of skills, functions, and working conditions; degree of employee interchange; and distance between locations and bargaining history. *RB Associates,* 324 NLRB 874, 877–878 (1997), citing *J & L Plate, Inc.*, 310 NLRB 429 (1993). However, I note that the organizational structure of the employer's operation is not controlling. While an employer has an expectation of reasonably adequate protection from the disruptive effects of piecemeal unionization, . . . the Board must also assure to employees the fullest freedom in exercising the rights guaranteed by the Act. Id. at. 5.

In *Children's Hospital of San Francisco*, 312 NLRB 920 (1993), enfd. 87 F.3d 304 (9th Cir. 1996), the Board affirmed the holding of an ALJ that Respondent California Pacific Medical Center had failed to rebut the presumption of a single-facility unit. The Board relied not just on many years of bargaining history between CNA and the predecessor, but also on the lack of significant interchange between nurses on the two campuses, the lack of functional integration between what are essentially two full service acute care medical facilities, and the absence of record evidence of any potential for undue adverse consequences resulting from a labor dispute in this unit.

Other recent cases involving the health care industry also support the General Counsel's theory that Respondent failed to rebut the single facility unit. For example, in *Northern Montana Health Care Center*, 324 NRLB 752 (1997), Respondent was found to be a successor with a duty to recognize and bargain with the union which represented employees of predecessor). See also *Visiting Nurses Association of Central Illinois*, 324 NLRB 55 (1997) (Single-facility unit found to be appropriate and day-to-day interests of RNs at Employer's facility are not merged with RNs at another facility.); and *Memorial Medical*, 230 NLRB 976, 977–978 (1977) (Most of Employer's policies and procedures are centrally controlled and uniformly applied to several different facilities, but single facility unit remains intact.)

c. Bargaining history

For over 20 years, Fresno County has recognized both CNA and SEIU as collective-bargaining representatives for the units in question and such recognition over the years has been embodied in a series of collective-bargaining agreements. The most recent of these are contained in the record (GC Exhs. 3, 4 and 5, SEIU unit 5, CNA unit 7, and SEIU unit 12 respectively). There is no bargaining history between either of the two Unions and any unit at CCH and FCH. I count this factor strongly against rebuttal as did the ALJ in *Children's Hospital of San Francisco.*[15]

In *Children's Hospital of San Francisco*, supra, 312 NLRB at 928, the judge found that the two campuses in question are located no more than a mile from each other. This should be compared to the instant case where FCH and VMC are located about 2–3 miles apart in downtown Fresno (five to 10 minutes compute). CCH is located about 10–12 miles away from VMC in the northern part of Fresno County (15 to 20 minutes commute), and about 12–14 miles away from FCH (15 to 20 minutes commute) (GC Exh. 2, par. 17, p. 7).

The judge in *Children's Hospital of San Francisco*, also found that subsequent to the merger, Respondent had centralized management over the two campuses, including the nursing department. Here, too, there is centralized management over all segments of operations including nursing, janitorial, maintenance, and clericals. Labor relations is also centralized as noted above, under the direction of McCloskey. As was true in *Children's Hospital of San Francisco*, Respondent holds itself out to the public as a single entity with one CEO, one CFO, and one board of directors.

Moreover, Respondent offered extensive evidence regarding floating of RNs both intra and interfacility, transfers and systemwide orientation, training, and holding of social events. In the context of this case, I find that any detailed analysis of this evidence is unnecessary and would be unavailing to Respondent's contention. Like the judge in *Children's Hospital of San Francisco*, supra at 829, I find that Respondent has failed to prove that UMC has lost its identity as a separate employer of employees grouped in appropriate units of RNs or clericals or maintenance and janitors. Finally, Respondent has offered no evidence to prove that a work stoppage at UMC would seriously disrupt Respondent's over-all operations. On the contrary, FCH and CCH are fully equipped, just as they were before the transaction, to function independently by making only minor adjustments in staffing, scheduling, and other facets of their operation.[16]

Based on the above discussion, and most particularly the extensive bargaining history (See *Radio Station KOMO-AM*, 324 NLRB 256 (1997); I find that Respondent has failed to rebut the single facility presumption. See *D & L Transportation*, 324 NLRB 160 (1997); *Heritage Park Health Care Center*, 324 NLRB 447 (1997), enfd. by Summary Order (2d Cir. 7/1/98).[17]

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[15] As noted above, it is also not significant that Respondent did not take over every aspect of VMC's operation. See *M. S. Management Associates,* 325 NRLB 1154 (1998). For example, the psychiatric clinic and prisoner services remained with the county. Other services such as anesthesia were contracted out.

[16] At p. 1698 of transcript, Respondent's witness Amy Tobin, former assistant director of nursing at VMC and subsequent executive for Respondent, testified on cross-examination about a former labor dispute at VMC in 1987. Assuming that a labor dispute 9 years before the time in question would have shed light on a unit question as of October, I note that Respondent did not attempt to develop this line of inquiry nor make an offer of proof.

[17] Respondent makes much of the judge's decision in *Providence General Medical Center*, Case 19–CA–23241 a case which apparently was never appealed to the Board. I agree with the General Counsel (Br. 78, fn. 70) and find that the judge's decision in *Providence General*

d. SEIU's consolidated unit

In this segment of the case, Respondent asserts that it was legally barred from recognizing SEIU in January 1997 because, by that time three separate units, units 5, 12, and 21 had been consolidated by Fresno County. In his brief, the General Counsel concedes, page 90, that if it is found that the three units were consolidated, then a recognize and bargain order is inappropriate because the combined unit contains a mix of nonprofessional and professional employees (within the meaning of Section 2(12) of the Act) and because no separate self-determination election was ever held. I find that Respondent's argument has merit and will recommend that the SEIU allegations be dismissed from the case.

The governing legal principles are clear enough: the merger of separately certified units, in effect, destroys the separate identity of the individual units. *Westinghouse Electric Corp.*, 238 NLRB 763, 764 fn. 2 (1978). Moreover, unit 21 includes professional employees such as physical therapists. Said professionals cannot be combined with nonprofessionals unless a majority of professional employees first approve their inclusion in such unit. Because no such approval ever occurred, Respondent need not bargain with SEIU. *Russelton Medical Group,* 302 NLRB 718 (1991).

In this case, Respondent offered certain exhibits to prove the merger (R. Exhs. 103–108, and addendums to GC Exhs. 3–5). However, it remained to Dee Ann VonBerg called by the General Counsel in rebuttal, to explain what occurred. VonBerg, chief county spokesperson between 1994–1997 in MOU negotiations and grievance processing, testified that prior to June, 1994, SEIU represented three separate county units 5, 12, and 21. But in June 1994 the county found it would be more convenient for it to consolidate the three units and SEIU apparently did not object. The Civil Service Commission for Fresno County approved the consolidation on or about August 18, 1994.

The county and SEIU represented by Bob Yates, who testified as an adverse witness for Respondent, could not reach a new agreement any time prior to the expiration of the former individual MOUs for the three units. By mutual agreement, the parties agreed to defer further discussion on a new MOU for the consolidated unit until shortly before the three separate MOUs expired in December. Sometime after SEIU's demand in January 1997, the parties reached agreement on a new MOU which was ratified in June 1997.[18] The question pending is, was the consolidation effective prior to the SEIU's demand for recognition so that Respondent was privileged to refuse SEIU's request.

VonBerg described the various steps taken to effect the consolidation required by the governing county ordinance 3.12.200 (Tr. 3855–3857). There is no claim in this case that all proper procedures were not followed. Notwithstanding the parties' failure to reach agreement on a new MOU for the consolidated unit, VonBerg, the General Counsel's own rebuttal witness, gave this testimony on cross-examination:

> Q. Is it accurate therefore to conclude that the units had been consolidated as of the day of the Civil Service Commission approval, but yet three documents remained, in effect, that is, the MOUs from 5, 12 and 21?
>
> A. Yes.
>
> [Tr. 3860.]

Thus, the consolidation was effective on August 8, 1994, and no further action on the part of the county or SEIU was required to complete the unit consolidation. Rather, to undo the consolidation, the parties would have had to return to the county Civil Service Commission. The need to void the August 1994 approval would not have occurred unless the parties had been unable to reach agreement on a consolidated agreement (Tr. 3871–3872). But an agreement was reached (R. Exh. 108).

Under the circumstances recited above, I reject General Counsel's argument that notwithstanding the approval of the Civil Service Commission in August 1994, the consolidation was not effective until June 2, 1997, when the new contract was ratified. I find it was effective, as testified to by VonBerg upon approval of the Fresno county Civil Service Commission. In the alternative, I find that the consolidation was effective on December 15 when the MOUs for 5, 12, and 21 all expired. Either way, Respondent would not have been required to recognize and bargain with SEIU when it filed its demand in January 1997. Not only was it privileged to refuse under the holding of *Russelton Medical Group, Inc.*, supra, but in addition, Respondent as well as SEIU, may well have exposed themselves to legal liability had it done so. See *Kaiser Foundation Hospitals*, 228 NLRB 468, 480–481 (1977), enfd. 577 F.2d 649 (9th Cir. 1978).

Accordingly, I reject the General Counsel's alternative argument, page 89 of brief, that even if the consolidation was effective in 1994, Respondent still had an obligation to recognize and bargain with SEIU as the exclusive representative of the employees in the combined unit because of substantial continuity between VMC and UMC and a majority of employees in the new unit 12 had been employed by VMC in the pretakeover units 5, 12, and 21. While I have found substantial continuity and majority status for units 5 and 12 above, I need not concern myself with majority status for unit 21. There is nothing in the successorship cases to trump the requirements of *Russelton*, supra and the General Counsel cites no case to that effect.

Finally, I also reject the General Counsel's argument, brief, pages 90–91, that Respondent has failed to prove that unit 21 contains professional employees within the meaning of Section 2(12) of the Act. The MOU for unit 21 which expired December 15, attachment A (R. Exh. 109), includes salary ranges for various classifications of physical therapist. This fact coupled with the case of *Kaiser Foundation Hospital*, supra, 228 NLRB at 480, where physical therapists within the State of California were found to be professional employees, convinces me that Respondent has proven physical therapists were part of unit 21 and are professional employees. See also *Avco Corp.*, 313 NLRB 1357 (1994).

Medical Center is of no precedential value whatsoever. Accordingly, I see no need to consider it.

[18] This MOU was between the county and SEIU for new consolidated unit 12 that covered all of the employees who had previously been represented as part of separate units 5, 12, and 21 (Tr. 3862, 3866) (R. Exh. 108).

For the reasons stated above, I will recommend that the SEIU segment of the case be dismissed.[19]

e. Good-faith doubt of CNA's majority status[20]

I begin with a statement of applicable law from I. P. Hardin *The Developing Labor Law* 571 (3rd Ed. 1992):

> An employer may withdraw recognition from an incumbent union at any time when such withdrawal is not precluded by law, if it can affirmatively establish either (1) that the union no longer enjoyed majority status when recognition was withdrawn, or (2) that the withdrawal was predicated on a reasonably grounded doubt as to the union's continued majority status, which doubt was asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. Furthermore, the employer must be aware of the objective facts upon which its doubt is based at the time it withdraws recognition. (Citations omitted.)

See also *NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775, 778 (1990).

In the instant case, the focus of Respondent's evidence was on its alleged good-faith doubt of CNA majority status. A good-faith doubt is a genuine, reasonable uncertainty about whether the [Union] enjoys the continuing support of a majority of unit employees. *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359 (1998). In the past, the Court found that Board decisions have "muddied the waters" with respect to the appropriate standard an employer must meet to satisfy its burden of proving a "reasonable good-faith doubt." Id. (finding that Board decision using the language "clear, cogent and convincing" evidence "incompatible with its stated preponderance of the evidence standard in determining an employer's" reasonable good-faith doubt). *Allentown* teaches that the Board cannot reject or discount probative evidence that tends to establish the existence of a good-faith doubt, otherwise appropriate under a preponderance of the evidence standard, by applying a stricter evidentiary standard than that which it has promulgated. Id.

In *Beverly Farm Foundation v. NLRB*, 144 F.3d 1048 (7th Cir. 1998), the court distinguished *Allentown Mack* and ultimately affirmed the Board's holding that the employer's doubt was not well founded and was unreasonable. I find here that Respondent's alleged doubt was not based on good faith.[21] Alternatively, I find that even if Respondent's doubt was based on good faith, it failed to meet the Board's standard as clarified by the Supreme Court in *Allentown Mack*. That is, Respondent's doubt was not well-founded and was unreasonable.

(1) Lack of good faith

The evidence in this case convinces me that Respondent never had any intention of recognizing CNA and the purported efforts by transition team and others including legal counsel, were mere window-dressing for a decision that had never been in doubt. Thus, I note that various reports prepared by outsiders such as Arthur Anderson and the various models prepared by Respondent's in-house representatives never allowed for any role to be played by the Unions. This omission is the more telling when one considers that in these reports every other conceivable permutation was considered except what role the Unions might play. Moreover, Respondent agreed to the transaction with the assumption, that VMC would be fully integrated into Respondent's operations. This was the testimony of McCloskey (Tr. 2696), and when put in context of this case, "fully integrated" means making whatever unilateral changes in bargaining unit employees' terms and conditions of employment were necessary to allow for maximum efficiency, as judged solely by Respondent's management.

In the purported pretransaction investigation involving McCloskey, to a certain extent, Attorney King[22] and other Respondent representatives, I was told over and over that the county was stone-walling and foot-dragging with respect to producing information relative to employee support for the CNA bargaining unit. However, in a meeting between McCloskey, King and Perea, the two Respondent representatives made it clear to Perea, a General Counsel rebuttal witness, that Respondent was not interested in having Unions as a part of their overall system in the context of merger discussion (Tr. 3344).

In any event, Perea admitted in his cross-examination, that there had been some difficulty in getting information about unions to Respondent, caused in part by chaos surrounding the merger, and in part, by the county attempting to protect privacy concerns (Tr. 3363). Nevertheless, Respondent's alleged predicament is more imagined than real. It never sought from CNA any of the records on membership, dues receipts, grievances, or any other subject. No credible reason for the oversight was submitted at hearing.

Although Respondent did not claim difficulty in obtaining any other type of information from the county and although I find Dee Ann VonBerg, a county senior personnel analyst, who testified on several different occasions at hearing, to be completely forthcoming and very cooperative with both sides, I admit the possibility that Respondent may have experienced difficulty in getting information from the county. If true, I fail

[19] Because Respondent's defense constitutes a legal bar, it is irrelevant whether Respondent was aware of the defense or relied upon it at the time it refused to recognize SEIU. Accordingly, I do not concern myself with these questions.

[20] Although Respondent claims to have had a good-faith doubt regarding both CNA and SEIU, I limit my decision to CNA because I have found for Respondent above regarding SEIU, and because all or most of the evidence at hearing on this point related to CNA. In agreement with the General Counsel, Br. 101 fn. 84, I find that any claim of a good-faith doubt for SEIU is unsubstantiated by any record evidence.

[21] To borrow a phase from the unlawful discharge line of cases, I find that Respondent's reasons were pretextual and suggestive of a different motive than the one asserted for the failure to recognize. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, the Act does not permit the employer to substitute "good" reasons for "real" reasons. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970).

[22] I wish to make it clear that I draw "no inference of guilt from awareness of one's legal obligations; to do so would to promote the ostrich over the farther seeing species." *Partington v. Brayhill Furniture Industries,* 999 F.2d 269, 271 (7th Cir. 1993).

to see how that fact would support Respondent's failure to recognize and bargain with the Unions. It is after all, Respondent's burden to rely upon sufficient evidence before its refusal to recognize, to justify its alleged good-faith doubt.

In conclusion, I note that at no time did Respondent ever respond substantively to the Unions' demands for recognition and bargaining. So to this very day, the reason Respondent failed to recognize and bargain with the Unions is unknown. See *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1210–1212 (1994), enfd. 87 F.3d 1318 (9th Cir. 1998).

(2) Doubt not well founded and was unreasonable

Before considering Respondent's evidence, I note first that as of October 6, there were 414 persons employed at VMC in unit 7 job classifications (GC Exh. 2, par. 2, p. 4). I note next that in general to be credited, Respondent's evidence must be proximate in time to the change in employers. *NLRB v. Curtin Matheson Scientific*, supra, 494 U.S. at 788–789. This is important in the instant case because much of Respondent's evidence related to events which occurred long before October 7.

It is also required that an employer must be aware of and rely on the objective facts upon which its doubt is based, at the time it withdraws recognition (or when, as a successor, it fails to recognize the union in the first instance). *Orion Corp.*, 210 NLRB 633, 634 (1974), enfd. 515 F.2d 81, 89 (7th Cir. 1975). This is important because as the General Counsel points out, brief, pages 101–102, there is evidence to suggest, and I find, that Respondent never relied on any alleged good-faith doubt as a reason not to recognize the Unions. Thus, in (GC Exhs. 31(a) and (b)) Respondent's position statements dated February 7, 1997 (CNA), and May 8, 1997 (SEIU), submitted to the Region, Respondent never mentioned any good-faith doubt as a basis for refusing to recognize the Unions. Where the reasons for Respondent's behavior are inconsistent, evasive and shifting as I find them to be here, there is strong circumstantial evidence that Respondent committed the unfair labor practice as charged. Cf. *Van Vlerah Mechanical, Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997). Finally, I noted that an employee may desire continued representation by a union even while engaging in a wide range of actions that disclose conflict with, or opposition to, the union's goals or tactics. I P. Hardin *The Developing Labor Law*, supra at 1997 Cum. Supp. p. 225.

Respondent presented former VMC bargaining unit witnesses who claimed to have withdrawn support for CNA based on a host of different factors:

(a) the protracted negotiations between the county and CNA;

(b) CNA's emphasis on certain issues at the expense of other issues;

(c) CNA's failure to communicate adequately with its bargaining unit employees to find out what they wanted a new collective-bargaining agreement to contain;

(d) CNA's waste of its energy and resources by opposing the closure of VMC, both as part of a coalition with other groups and on its own initiative;

(e) a CNA leader, Karen Short, opposing the closure of VMC at the bargaining table and elsewhere, in a way that some members found objectionable; and

(f) based on a decision of its state delegates in a state convention, CNA withdrawal from the American Nursing Association.

I find that notwithstanding the witnesses drawing of legal conclusions that they and many work acquaintances withdrew support for CNA based on one or more of these events, the evidence simply does not reasonably lead to that conclusion. Either the objected-to events happened too long before October 7, or the matter was resolved, such as the exit of Short in early 1996 from all her CNA offices, or the objections of the witnesses was not to CNA per se, but merely to a particular policy, goal, or tactic. I note that all or most of Respondent's former VMC bargaining unit witnesses continued their CNA membership through October 6. A few, while bashing CNA, even on the witness stand, professed a strong belief in having a labor union represent them in collective bargaining.

In *Briggs Plumbingware v. NLRB*, supra, 877 F.2d 1282, 1288–1289 (6th Cir. 1989), the court noted that employee statements of dissatisfaction with a union are not deemed the equivalent of withdrawal of support for the union as the exclusive bargaining representative. The court continued that mere disparaging remarks about a union to management may have been made to incur the employer's favor. (See also *Redok Enterprises*, 277 NLRB 1010, 1012 (1985). Further, the mere fact a few members sought to cancel their automatic dues deduction does not show union repudiation. *NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 569–570 (2d Cir. 1994).

In *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992), the court held that a high turnover of employees unaccompanied by objective evidence that new employees do not support the union is no evidence of loss of majority status by the union. Finally, in *Manna Pro Partners L.P. v. NLRB*, 986 F.2d 1346, 1353 (10th Cir. 1993), the court noted that the source of the alleged employee dissatisfaction was too remote in time for Respondent to rely on.[23]

As I suggested above in drawing an adverse inference, I specifically find herein that Respondent has failed to link-up the evidence allegedly supporting a good-faith doubt with the decision to refuse to recognize CNA. I repeat that the record fails to demonstrate who made the decision and why it was made. Thus, even assuming for the sake of argument the evidence of good-faith doubt was adequate to its supposed purpose, it is of no benefit to Respondent. In other words, the record does not adequately establish, what did Respondent know and when did it know it. For the reasons stated above and below, I find that Respondent has failed to prove its good-faith doubt defense.

Respondent's witnesses on the good-faith doubt issue may be divided into two groups: (1) former unit 7 employees at VMC now working for Respondent, and (2) former VMC supervisors now working for Respondent as supervisors. In the former category, Genevieve Rohan, RN, worked for VMC for 2 periods for a total of about 10 years. She left there in July and was hired by Respondent in October. Currently Rohan works as a trauma nurse coordinator. During her time at VMC, Rohan was part of the bargaining unit, and a member of CNA. In fact,

[23] All of the legal authorities cited in this segment of my decision, 2,d, (2) are unaffected by *Allentown Mack Sales & Services.*

she even continued her CNA membership for about 6 years that she worked elsewhere. Rohan expressed disapproval with the pace of negotiations during 1994 and 1995 and with the emphasis on certain issues to the exclusion of others. Rohan joined with other RNs such as Sandra Yovino and Janet McQuillen, RNs, both also Respondent's witnesses, to send a letter to Don Nielsen, a CNA official, complaining about various matters relating to CNA. For all of her alleged dissatisfaction, Rohan never dropped her CNA membership as she felt collective bargaining was very important.

Another Respondent witness was Diana Johnson, RN, hired by Respondent in October to perform the same job she performed at VMC, nurse in the OR. Like Rohan, Johnson objected to CNA's negotiating team which she heard about through the grapevine. In the summer of 1995 Johnson claimed that 20 out of 30 RNs were critical of CNA based on negotiations. Johnson also claimed she tried to drop out of CNA but her request was untimely.

Yovino and Macmillan generally tracked Rohan in their testimony. All Respondent witnesses who formerly worked in the VMC bargaining unit and are now working for Respondent claimed to have conveyed their alleged dissatisfaction to supervisors such as Bruce Kinder and Amy Tobin, RNs, who both went to work for Respondent.

Kinder, for example, began working at VMC in 1984 as a new RN and rose through the ranks to become assistant director of nursing in July 1995. Kinder then left VMC in the spring and was hired by Respondent in April as project manager for VMC transition. Currently, Kinder is a high-level manager for Respondent as a service integrator for the cardiopulmonary pathway. While employed at VMC, Kinder was a member of the negotiating team for the CNA and held certain other important offices for CNA before he became part of VMC management in 1989. Kinder alluded to a speech by Karen Short in 1995 to the Fresno County board of supervisors (R. Exh. 44, 44(a)). In her opposition to the closing of VMC, Short overstated her case, the result of which was to anger and antagonize some RNs. The speech was broadcast on local radio and heard throughout VMC. At its conclusion, about 10 RNs such as Rohan called Kinder and asked him how to get out of CNA.

Kinder left VMC on April 12, but claimed to have maintained a close relationship with many of his former colleagues at VMC. This relationship was both professional and social. Kinder developed the impression that CNA was not supported by a majority of RNs in unit 7 and reported this impression to McCloskey and other members of Respondent's HR Task Force.

Respondent also called Amy Tobin, who worked for VMC about 12 years from 1983 to 1995. Before leaving VMC, Tobin, like Kinder, held high level management jobs such as Assistant Director of Nursing. Unlike Kinder, Tobin was never a member of the unit 7. In late 1995 Tobin worked for Respondent as a consultant, working with other team members under the auspices of Arthur Anderson & Co., building financial models, based on various contingencies. In January Tobin was named service integrator in oncology. Then in October 1997 Tobin left the regular employment of Respondent, but continues to work on a per diem basis.

While at VMC, Tobin was part of the management side negotiating team. She described negotiations with CNA as protracted and acrimonious, marked by several instances of unprofessional conduct by CNA negotiators.[24] As noted above, the CNA-Fresno County bargaining agreement was finally agreed to in May or June 1995 (GC Exh. 4). Also as noted above, there was disagreement in certain quarters about CNA's goals for negotiations. According to Tobin, during negotiations, she spoke to many of these bargaining unit dissidents such as RNs in ICU, burn center and ED, who expressed disappointment with the CNA bargaining team. Tobin spoke not only to bargaining unit members, but also to nurse managers such as Diana Johnson who also testified as a Respondent witness and Ms. Fergeson who supervised about 25 RNs in the surgical/medical floor and Tom Stoeckel, who supervised about 70–80 RNs in the ED. All of these nurse managers allegedly related to Tobin statements of dissatisfaction by bargaining unit employees based on how their elected negotiating team representatives were representing their interests. Supposedly, morale was low, turnover was high, and employees were concerned about their job as the possible take-over becamed source of constant attention by CNA employees and other employees.[25]

Then Tobin left in October of 1995, 1 year before the time in question. Tobin claimed to have continued her contacts with VMC RN employees and nurse managers as part of her consulting duties for Respondent. I find Tobin's testimony of little value on the good-faith doubt issue. Apart from the staleness of her information, and the transitory nature of the dissatisfaction, I question the multiple hearsay nature of her reports by the other nurse managers, particularly those like Fergeson and Stoeckel who did not testify. Finally, I note that in April, of 1995, Tobin estimated about 450 RNs in the unite 7 bargaining unit working at VMC (Tr. 1716). Tobin's inquiry of nurse managers, before she left VMC, focused most on 4E (medical/surgical) ICU and ED (Tr. 1733–1734). Tobin estimated that as of the time prior to October 1995 when she left at VMC, 4E had about 30 RNs, ICU, 65–80 RNs, and ED 60–70 RNs (Tr. 1736–1737). Even if all RNs in these three units were opposed to the Union, a rather far-fetched notion, that would still leave a clear majority of the bargaining unit about over 60percent in favor.

Finally Tobin testified that Ralph Jimenez, the county's lead negotiator for the CNA collective-bargaining negotiations, allegedly told her during negotiations that about 115 RNs had completed drop cards for CNA to stop automatic dues deduction (Tr. 1715). Tobin also recalled Jimenez telling her at some point during negotiations that the county was considering with-

[24] For example, at one point during heated discussions, Short remarked about one of the management negotiators who was on crutches, saying she hoped he'd break his other leg. Another CNA negotiator remarked in an insulting manner about the Hispanic heritage of members of the management bargaining team.

[25] Because the County was losing large sums of money in operating VMC, the County too was considering various options before the one ultimately chosen. These included, closure, downsizing, and privatization without a merger. Each of these options had champions and opponents and were publicly discussed.

drawing recognition from CNA, based on loss of majority support. For unknown reasons, Jimenez was never called as a witness by either side—and I draw no adverse inference form his absence. However, as noted above, the General Counsel did call in rebuttal Henry Perea, currently a senior staff analyst for the county and during 1994–1995, a member of the county bargaining team, who did not subsequently go to work for Respondent. He denied that the county was ever considering withdrawing recognition from CNA and he denied any knowledge of 115 CNA drop cards. On the contrary, he testified that the information available to the county during negotiations was that union membership was holding steady (Tr. 3354). I credit Perea on these two key points and find that Tobin was mistaken.[26]

On surrebuttal, Respondent called three former VMC bargaining unit employees all of whom are now employed by Respondent. I have considered the testimony of Paul Avalos, Loretta Robeston, and Cislyn Blackwood and find little has been added to Respondent's case. Even when all the evidence allegedly supporting good-faith doubt is considered in toto, I find that such evidence falls far short of the mark. Accordingly, for the reasons previously stated, I find that Respondent has failed to establish a good-faith doubt. Even if the evidence was sufficient, a notion I reject, without the nexus to a specific decision maker, the evidence cannot be said to have been relied upon by Respondent to deny recognition to CNA. Therefore, I reject this affirmative defense.

3. The handbook allegations

a. Respondent's motion to dismiss handbook allegations

On August 18, 1998, over 2 weeks after the parties filed their briefs, Respondent filed a document styled, "Respondent's Motion to Dismiss Allegations Relating to Employee Handbook." In this motion, Respondent moves that paragraphs 8 and 9 of the complaint (employee handbook allegations) in Case 32–CA–15864 be dismissed on statute of limitations grounds. On September 2, 1998, the General Counsel filed a document in opposition to Respondent's motion to dismiss. I deny Respondent's motion on procedural grounds, finding a bar to consideration of the Motion on its merits.

First, I find that notwithstanding how Respondent's motion is styled, it constitutes in effect, an unauthorized reply brief. As a matter of discretion, based on Respondent's failure to seek permission in advance to file a reply brief, and based on Respondent's failure to tender a persuasive case for why it finds itself in the present uncomfortable position, I reject Respondent's reply brief. See *J & J Drainage Products Co.*, 269 NLRB 1163, 1164 (1984).[27]

In the alternative, I deny Respondent's motion because a statute of limitations defense is an affirmative defense which must be pled and litigated at the hearing. *Prestige Ford, Inc.*, 320 NLRB 1172 fn. 3 (1996) (the General Counsel's allegations not time-barred under Sec. 10(b) of the Act where Respondent did not raise defense in its answer or at the hearing, but did so for the first time in posthearing brief to the judge). See also *Fitel/Lucent Technologies,* 326 NLRB 46 (1998); *Laborers' Local 324 (AGC of California)*, 318 NLRB 589 fn. 1 (1995). In the present case, Respondent did not plead a statute of limitations defense in its Answer to Case 32–CA–15864 (GC Exh. 1(j)) and none was litigated at the hearing. Moreover, Respondent did not even raise the defense in its initial posthearing brief.

Perhaps anticipating the above, Respondent attempts (motion, p. 6, fn. 7), to avoid the consequences of its own inadvertence, by claiming that the alleged 10(b) issue raises jurisdictional problems for the Board. However, Section 10(b) is a statute of limitations and is not jurisdictional. *Electrical Workers Locals 2222,* et al. (*System Council T-6)*, 236 NLRB 1209, 1217 fn. 5 (1978) (citations omitted); *Federal Management Co.,* 264 NLRB 107 (1982).

Finally, Respondent implies (motion, pgs. 1–2, fn. 1), that it was misled on the first day of the hearing by the General Counsel. A brief review of the transcript is sufficient to rebut this contention:

> MR. HENZE: There's one more matter before we go to the other exhibits. There's one amendment to the complaint, and it's simply deleting one of the allegations in par. 8(b) regarding the handbook. Par. 8(b)(1) "bulletin board." General Counsel would move to delete that allegation in its entirety.
>
> J. STEVENSON: All right. Never an objection about that, I assume, right?
>
> MR. GUEVARA: None.
>
> J. STEVENSON: None, all right, that motion will be allowed to delete par. 8(b)(1).
>
> [Trs. 67–68.]

The deleted allegation reads:

> b. The [Employee] Handbook contains, inter alia, the following provisions:
>
> (1) Bulletin Boards
>
> Information of special interest to all employees is posted regularly on bulletin boards located throughout community's facilities. Employees may not post information on these bulletin boards without approval from Human Resources. [p. 16.]

Based on the above discussion, I find that Respondent has waived a defense under Section 10(b) of the Act and there is no need at all to cover the matter on its merits.

[26] Perea was a 21 year county employee with no connection to CNA or Respondent. Moreover, he was part of management during CNA negotiations. Furthermore, like Jimenez, Perea was of Hispanic background. So when a CNA representative made a biased comment at the bargaining table about Hispanics, both men took the remark personally and caused the county to file unfair labor practice charge against CNA. This filing interrupted negotiations for a period, but the matter was later dropped. All this shows me that Perea was not biased for or against any party in this case.

[27] Notwithstanding this finding, I decline to strike Respondent's motion from the record.

b. The handbook allegations

At paragraph 8(e) of the complaint in Case 32–CA–15864, it is alleged that Respondent has maintained an employee handbook in effect at UMC wherein at page 17, there is listed (2) standards of conduct:

> You are required to adhere to all policies, procedures and professional standards of conduct. Failure to do so may result in disciplinary action up to and including discharge.
>
> While it is not intended to be an exhaustive list, below are examples of misconduct that are not permitted and may lead to disciplinary action, including discharge:
>
> 1. Insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual;
>
> 2. Unauthorized removal, damage, use or possession of records or information belonging to community.
>
> . . . .
>
> 8. Release or disclosure of confidential information concerning patients or employees.[28]

In its answer (GC Exh. 1(j)) to the complaint, Respondent admits that it maintains a handbook which contains the provisions recited above. General Counsel contends (Br. 23–27) that the cited provisions violated Section 8(a)(1) of the Act and Respondent denies this claim.

As explained in the prior section, Respondent has inadvertently neglected to discuss these issues in its 175 page brief. But no matter. Resolution of the issues will not take long. Relying on *Southern Maryland Hospital Center*, 293 NLRB 1209, 1221–1222 (1989), I find that rule 1 (insubordination, etc.) is overbroad and violates Sec. 8(a)(1) of the Act. In the cited case, the offending rule, prohibited ". . . derogatory attacks on fellow employees, patients, physicians or hospital representatives. . . ." I note that a concerted employee protest of supervisory conduct is protected activity under Section 7 of the Act. *Millcraft Furniture Co.,* 282 NLRB 593, 595 (1987). Such Section 7 conduct could easily fall within the prohibition of the rule in question and the protected activity could be labelled insubordination or disrespectful conduct. Furthermore, the rule purports to cover not just two categories of supervisors, but "other individuals" as well. Perhaps an employee who objects to union solicitation in the cafeteria, for example, could claim he was disrespected by union organizers. The general rule is that no restrictions may be placed on the employees right to discuss self-organization among themselves [nor on employees' right to engage in other Section 7 activity], unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Koronis Parts, Inc.* 324 NLRB 675 (1997). Moreover, the lack of enforcement of an unlawful rule is no defense. Id.

I also find in partial agreement with the General Counsel that rule 8 is overly broad because it is indiscriminate to its application. *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–466 (1987). As explained by the judge, Id. 466, the rule in question could reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment, including wages, which could fall under the broad category of confidential information concerning employees.

On the other hand, rule 3 appears to me to be narrowerly drawn and straightforward. It could not reasonably be said to inhibit organizing activity or to apply to other Section 7 activity. Accordingly, I will recommend dismissal of that portion of the allegation.

4. Overruling of Board precedent

As an alternative theory, the General Counsel urges the Board (Br. 114, et seq.) not only to overrule *Celanese Corp. of America*, 95 NLRB 664 (1951), but to do so retroactively. More specifically, the General Counsel urges the Board to bar any withdrawal of recognition by an employer of a certified bargaining representative, except as a result of a Board conducted election, whereby the Union is voted out and decertified. I express no opinion on the merits of the argument for the following reason: (1) As an ALJ, I lack authority to overrule a decision of the Board and I am bound by its decisions. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616–617 (1963); (2) Retroactively, is generally disfavored in the law. . . in accordance with "fundamental notions of justice that have been recognized throughout history. *Eastern Enterprises v. Apfel*, 524 U.S. 498, (1998); and see also *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 149, 151 (9th Cir. 1952). Moreover, in light of my decision above, it is unnecessary to decide General Counsel's alternative theory.[29]

5. Time limits

a. Factual basis

During the hearing of this case, a number of problems developed with the presentation of evidence. In some cases, the parties were not prepared to go forward; in other cases repetitious and cumulative evidence was presented. Repeatedly, erroneous and inaccurate estimates were provided as to how long a party's case would take or as to how long a particular witness' direct or cross-examination would take. To allow the parties time to discuss stipulations or to look at each others documents, frequent recesses or extended lunches were necessary. Rarely, if ever were documents marked in advance. On occasion, cross-examination became disjointed and unfocused.

On March 4 (day 9 of hearing) I expressed concern with the slow pace of the hearing and put the parties on notice I was considering time limits for Respondent. This was apparently interpreted by Respondent as a challenge for it to continue the status quo. Thus new witnesses were added to the nonmandatory list of witnesses provided to me by Respondent, and the sluggish pace otherwise continued. On Thursday, March 5, 1998, I imposed a 1-week time limit for Respondent to finish its case. This time limit was subsequently extended to Friday, March 13, 1998, though as late as Tuesday, March 10,

[28] At p. 23, fn. 16, of his brief, the General Counsel withdraws the separate allegation (par. 8(b) of the complaint) relating to alleged improper use of a bulletin board as referenced above.

[29] I assume strictly for the sake of argument that a change in the law as urged by the General Counsel would apply to the instant case where Respondent never recognized either Union in the first place.

1998, Respondent's attorneys told me with some reservations, that it expected to complete its case by Thursday, March 12, 1998 (Tr. 2469).

To a certain extent, all attorneys were responsible for some delays, but Respondent's attorneys were responsible for causing the greater proportion of delays. When criticized for taking too much time, they repeatedly invoked their client's interest as a talisman for the delays. Of course, some delay is inevitable in all litigation, particularly in a long case with numerous documents like the instant case. However, I cannot permit an attorney's irrational exuberance in defense of its client to expand and inflate the reasonable time which this case or any case should take. To put the matter in its simplest possible terms, because this case was taking too much time in proportion to the valid issues presented, I find as a matter of discretion, that there was no reasonable alternative except to impose certain time limits, including the time limits for Respondent to rest its case over its objection. As noted above, I demonstrated flexibility so as not to "engender an unhealthy preoccupation with the clock," by allowing Respondent to have 1-half day of additional time before requiring it to rest.

b. Legal basis

In *U.S. v. Vest*, 116 F.3d 1179, 1186–1188 (7th Cir. 1997), cert. denied 522 U.S. 1119 (1998), a criminal case, the court affirmed the use of time limits in an appropriate case. At page 1187 of that decision, the court recited the precedents to set time limits in civil cases. Of course, it may be argued that these authorities are not applicable to ALJs in administrative hearings. To any such claim, I would respond in the words of the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 513 (1977), that the role of the ALJ is "functionally comparable" to that of a judge. Cf. *NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981).

For additional legal authority to justify time limits, I rely upon Section 102.35(f) of the Board's Rules and Regulations[30] and Rule 611(a)[31] and Rule 403[32] FRE. The Board is required to follow the Federal Rules of Evidence to the extent practicable. *Fimco Inc.*, 282 NLRB 653, 654 (1987); *NLRB v. Maywood Do-Nut Co.,* 659 F.2d 108, 110 (9th Cir. 1981). Section 102.121 of the Board's Rules provide that "the rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the Act." *Dorsey Trailers, Inc.*, 322 NLRB 181 fn. 6 (1996). I find that the imposition of time limits on Respondent and other parties was the least restrictive means of furthering the Board's compelling interest in expediting the hearing while protecting the interests of all parties. See *Manor West, Inc.*, 311 NLRB 655, 669 (1993).

In still further support of my decision to set time limits as a matter of discretion, I rely upon *George Joseph Orchard Siding, Inc.*, 325 NLRB 252 (1998), where the Board affirmed the ruling of an administrative law judge to appoint interpreters in unfair labor practice proceedings, finding that such power is inherent and implied in the office of administrative law Judge. Moreover, the Administrative law Judge may direct the General Counsel to pay for an interpreter for Respondent's witnesses. See also *Domsey Trading Corp.*, 325 NLRB 429 (1998).

In conclusion, I affirm that my decision on the allegations of the complaint was unaffected by any issue having to do with time limits or the reasons in support thereof. Based on the total record, no party can reasonably claim that it did not receive a fair and impartial hearing or that it was otherwise deprived of its right to due process of law. Notwithstanding what I have just stated, it is always possible that a party may attack the judge.

It is, of course, unseemly for me to defend my own conduct. However, I would hope that my behavior would meet the standard described by Judge learned Hand in *Brown v. Walter*, 62 F.2d 798, 799 (2d Cir. 1933): "[a] judge, at least in a federal [trial], is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary." I urge the Board to find that given the extraordinary facts and circumstances surrounding this case, I was fully justified in imposing time limits on Respondent and other parties.

CONCLUSIONS OF LAW

1. Community Hospitals of Central California d/b/a University Medical Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. California Nurses Association and Service Employees International Union, Local 752, Service Employees International Union, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. California Nurses Association and Service Employees International Union, Local 752, Service Employees International Union, AFL–CIO were the certified bargaining representatives and had long periods of bargaining history respecting units 7, 5, and 12 employed by Valley Medical Center in Fresno, California until its takeover by Respondent on October 7.

4. Respondent is a successor to VMC in the unit set forth below operating that facility at all times on and after October 7; former county units 7: Employees of University Medical Center formerly employed at VMC in the following job classifications: anesthetist I, II, and noncertified clinical nurse specialist, mental health nurse I and II, nurse interim permittee and (permittee a), nurse practitioner, public health nurse I and II, staff

[30] In pertinent part, this Section (Duties and power of administrative law judges) reads. . .

> The administrative law judge shall have authority, with respect to cases assigned to him,
>
> (f) to regulate the course of the hearing.

[31] Rule 611(a) FRE. Mode and order of interrogation and presentation:

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment and undue embarrassment.

[32] Rule 403 FRE. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

education and development instructor (step 4), staff nurse I, I-A, II, II-A, III, and III-A.

5. CNA demanded recognition from Respondent effective October 7, as the representative of unit 7 employees and SEIU demanded recognition of Respondent effective January 13, 1997.

6. As a result of the successorship CNA and SEIU enjoyed a rebuttable presumption of majority employees support amongst bargaining unit employees in units 7, 5, and 12 as appropriate.

7. Respondent has failed to rebut the single facility presumption as to all units.

8. Respondent did not have a good-faith doubt that a majority of unit 7 employees supported CNA at relevant times.

9. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing at all times since October 7, to recognize and bargain with CNA with respect to former county unit 7.

10. Respondent violated Section 8(a)(1) of the Act by maintaining provisions of its employee handbook, page 17, Standards of Conduct, pars. 1 and 3 of said handbook.

11. Other than specifically found herein, Respondent has not violated the Act in any other particulars.

REMEDY

Having found that Respondent has violated the Act in certain respects as alleged, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

I will also recommend that Respondent be directed to recognize and bargain with CNA and make CNA unit employees whole for any losses they suffered as a result of Respondent's failure to recognize and bargain with CNA, with interest as calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I will also recommend that Respondent be directed, upon request by CNA, to restore the status quo ante respecting terms and conditions of CNA unit 7 employees' employment.

[Recommended Order omitted from publication.]